Supreme Court, U.S.
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No. _____

In The Supreme Court Of The United States

MARGARET A. BAGLEY, Warden,

Petitioner,

v.

JOHN W. BYRD, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 01-3927

In re: JOHN W. BYRD, JR.,
Movant.

Filed: October 9, 2001

ORDER

A majority of the judges in regular active service have voted that the court remand this matter for the development of a factual record sufficient to permit *sua sponte* consideration of a request for leave to file a second petition for a writ of habeas corpus. The jurisdictional basis for a rehearing *sua sponte* is *Triestman v. United States*, 124 F.3d 361, 367 (2d Cir. 1997); *Krimmel v. Hopkins*, 56 F.3d 873, 874 (8th Cir. 1995).

The remand for the development of a factual record is ancillary in nature to the petition for the writ of habeas corpus. A majority of the active judges has decided that a factual basis does not exist sufficient to permit the en banc court to entertain the Petitioner's request for a successive filing. We therefore issue this remand, directed to the Chief Judge of the Southern District of Ohio for appointment of a

Magistrate Judge to promptly conduct an appropriate factual hearing.

The hearing should develop a record with regard to John Byrd's claim of innocence presented to the Ohio courts but on which no testimony of witnesses or evidence was taken. We direct that the scope of the factual inquiry conducted by the Magistrate Judge shall include testimony relating to matters set forth in the affidavits of John Brewer, Dan Cahill, Darryl Messer, Roger Hall and Benny Fields.

In addition, the factual inquiry shall include, but is not limited to, an examination of the following:

1. Documents prepared by the Hamilton County Prosecutor's Office and/or Hamilton County Sheriff's Department authorizing, directing or identifying Ronald Armstead, Virgil Jordan, Marvin Randolph and Robert Jones to be questioned in matters relating to the issue of innocence raised in this matter.

2. Documents prepared or received by the Hamilton County Prosecutor's office or Hamilton County Sheriff's Department or Cincinnati Police Department relating to Ronald Armstead's incarceration, testimony and parole revocation hearing and disposition.

3. Documents or reports received by the Attorney General's office or Hamilton County Prosecutor's office from the Ohio Department of Corrections or its institutions, relating to this matter.

We further direct that this matter proceed on an expedited basis with the Magistrate Judge submitting a report with

factual findings and recommendations to the en banc court within 45 days from date of the appointment of the Magistrate Judge.

IT IS ORDERED that the matter be, and it hereby is remanded. The Magistrate Judge shall report factual findings to this court, which retains jurisdiction in the matter.

IT IS FURTHER ORDERED that the stay of execution currently in place remain in force, pending further order of this court.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Clerk

CONCURRING OPINION

JONES, Circuit Judge, concurring in the Order of Remand, in which DAUGHTREY, COLE, and CLAY, Circuit Judges, join.

The most gentle characterization I can offer of the dissents of Judge Boggs and Judge Suhrheinrich is that they constitute a fanciful exegesis that bears little relationship to the facts of this case or the requirements of the law. Each dissenter accuses the en banc majority of "lawless" actions or of acting without a lawful basis. Accordingly, even though I am not a member of the en banc court, as is true of Judge

Suhrheinrich, with no vote on the issue at hand, as is also true of Judge Suhrheinrich, I am nevertheless compelled to write this response to correct statements and impressions conveyed by the dissents.

A reference to a statement in Judge Suhrheinrich's dissent illustrates the point. It states: "To date, Judge Jones has not written a dissent that sets forth his legal reasoning." *Byrd v. Collins*, 2001 U.S. App. LEXIS 21769, No. 01-3927, *order of remand*, at *1 (6th Cir. Oct. 9, 2001) (Suhrheinrich, J. dissenting). Such a charge is intended to convey the impression that the en banc court, in reacting to my dissent, did so without the benefit of a written opinion. In fact, I circulated to the full en banc court a twenty-six page dissenting opinion, that set forth, in a comprehensive manner, the legal justification for the action the en banc court decided to take. I should note that part of the opinion included a lengthy discussion of the jurisdictional basis for the court's actions. In light of the dissents, I reiterate the portion of my dissent that relates to the jurisdiction of the court to remand this case in order to develop a factual record, a record the state courts refused to make.

Notwithstanding the obfuscation and manipulation of the issues by the dissenters, what compelled the en banc court to issue the Order of Remand is simple. When a habeas petitioner wishes to file in the district court a second or successive habeas petition, AEDPA requires that he first obtain authorization from the federal court of appeals.[1] Congress, therefore, vests in the appeals court a statutory duty

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[1] The statute reads: "Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U.S.C. § 2244(b)(3)(A).

to determine whether to authorize a second bite at the habeas apple. The statute then lays out various requirements the petitioner must satisfy before the court can certify the second or successive petition.[2] If the petitioner is unable to satisfy the statutory requirements of the AEDPA, the court of appeals may yet authorize a second or successive filing if the court deems that this is necessary to prevent a miscarriage of justice.[3] There is no disagreement on the court that Petitioner Byrd does not satisfy the statutory filing requirements of the

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[2] The statute further provides that: "The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection." 28 U.S.C. § 2244(b)(3)(C). Specifically, the petitioner's claim shall be dismissed under § 2244(b) unless he demonstrates that his claim "could not have been discovered previously through the exercise of due diligence," or that the claim "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2244(2)(A) & (B).

[3] The actual innocence/miscarriage of justice exception is articulated in *Schlup v. Delo*, 513 U.S. 298, 130 L. Ed. 2d 808, 115 S. Ct. 851 (1995), in which the court held that a prisoner who fails to satisfy AEDPA filing requirements for a successive habeas petition "may obtain review of his constitutional claims only if he falls within the 'narrow class of cases . . . implicating a fundamental miscarriage of justice." *Id.* at 314-15. *See also*, *McCleskey v. Zant*, 499 U.S. 467, 113 L. Ed. 2d 517, 111 S. Ct. 1454 (1991), holding that "if a petitioner cannot show cause, the failure to raise the claim in an earlier petition may nonetheless be excused if he or she can show that a fundamental miscarriage of justice would result from the failure to entertain the claim." *Id.* at 494-95.

AEDPA. However, a majority of judges in active service have agreed that the court is without an adequate factual record to determine whether a second filing is warranted under the miscarriage of justice exception. Therefore, a majority of the en banc court has remanded the case for a hearing on the evidence supporting Byrd's claim that he is entitled to file a second petition under the statutory exception.

Byrd has presented to this court the confession of an accomplice, John Brewer, that it was Brewer, not Byrd, who murdered Monte Tewksbury. The Order of Remand was compelled by the fact that a majority of active judges, comparing the statements in the confession to supporting facts in the record, agree that this evidence of actual innocence potentially satisfies the miscarriage of justice exception and likely warrants a second habeas action. The impediment to the court so ruling was the fact that the Ohio courts have repeatedly refused every request for discovery and an evidentiary hearing on the Brewer confession.[4]

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[4] In my statement, circulated to the full en banc court, I set forth the reasons why Petitioner Byrd is entitled to an evidentiary hearing under § 2254(e)(2). That section provides that "if the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing" unless the prisoner meets various statutory exceptions.

Again, I observe that the references to evidence Byrd withheld from his first federal habeas petition, while they serve to explain why he cannot show cause for abuse of the writ, are unimportant for the purposes of whether he is entitled to a hearing under § 2254(e)(2). The all-important observation is that, once it was in his possession, Byrd made every attempt to come forward with his evidence of actual innocence, i.e., the Brewer confession, in his state post-conviction proceedings. The record is clear: the state trial and

Obviously, the lack of a factual record on such potentially exculpatory evidence was no impediment for the panel majority. The panel, over my dissent, wrongly refused Byrd's request for authorization to file a second habeas petition, turning a blind eye to serious gaps in the record. The centerpiece of the dissents to the Order of Remand is the argument that the en banc court was powerless to order a rehearing to correct the panel's erroneous decision.

The view that the en banc court lacked jurisdiction to consider the panel majority's adverse decision reads into the AEDPA a meaning the plain text of the statute does not support. The statute prohibits an authorization decision from being "the subject of a petition for rehearing." 28 U.S.C. § 2244(b)(3)(E). This court, in *In re King*, 190 F.3d 479 (6th Cir. 1999) extended the reach of the statute to preclude not only petitions for rehearing but also petitions for rehearing en banc.[5] Nevertheless, AEDPA did not alter the authority of the en banc court to order a rehearing on its own motion. In *Triestman v. United States*, 124 F.3d 361 (2d Cir. 1997), the Second Circuit observed that the federal courts of appeals retain the power to order a rehearing *sua sponte*.

> "Notwithstanding the restrictions on appealability in § 2244(b)(3)(E), this court has the authority to order a rehearing sua sponte. It is well-established that a court of appeals is entitled both to reconsider a prior

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appellate courts refused Byrd's every request for discovery and an evidentiary hearing on his claim of actual innocence.

[5] Specifically, the court held that "once a panel of this court grants or denies an individual permission to file a second or successive petition in the district court, § 2244(b)(3)(E) prohibits any party from seeking further review of the panel's decision, either from the original panel or from the en banc court." *In re King*, 190 F.3d at 479.

> decision *sua sponte* . . . and to order a rehearing sua sponte (citations omitted). By mandating that the initial decision of the court of appeals 'shall not be the subject of a *petition* for rehearing' (emphasis in original), § 2244(b)(3)(E) provides only that a disappointed litigant may not ask the court to reconsider its certification decision. By its plain terms, it does not purport to limit the court's own power to review its decisions or to undertake a rehearing."

Id. at 367. In dissent, Judge Boggs argues that notwithstanding the emphatic language of the court in *Triestman*, the case is not on point because it involved a sua sponte order of a three-judge panel rather than, as in Byrd's case, the full en banc court. *Byrd v. Collins*, 2001 U.S. App. LEXIS 21769, No. 01-3927, *order of remand*, at *3 (6th Cir. Oct. 9, 2001) (Boggs, J. dissenting). Remarkable! This fact is hardly a basis on which to distinguish *Triestman*. Rather, the fact that a majority of active judges agrees that a rehearing is necessary serves only to reinforce the fact that the court acts completely within the law.

The Second Circuit is not alone in this interpretation of the statute. In *United States v. Lorentsen*, 106 F.3d 278 (1997), the Ninth Circuit adopted the view of the statute articulated in King that AEDPA bars petitions for rehearing en banc. One year later, the Ninth Circuit decided *Thompson v. Calderon*, 151 F.3d 918 (1998), in which the court followed the *Triestman* analysis that "the language [of § 2244(b)(3)(E)] does not preclude sua sponte review by an en banc court. It merely precludes the parties from seeking a rehearing." *Id.* at 922. The Ninth Circuit had no difficulty rejecting the flawed analysis advocated in the dissents. Neither did a majority of active judges on this court. Indeed, even the Supreme Court has acknowledged this distinction

when interpreting an analogous section of the statute. The Supreme Court in *Calderon v. Thompson*, 523 U.S. 538, 140 L. Ed. 2d 728, 118 S. Ct. 1489 (1998), examined the language of § 2244(b) which limits the authority of the federal courts to entertain abusive or successive petitions.[6] The Court did not hesitate to affirm the view that the federal courts retain the authority to hear even abusive or successive applications sua sponte. "As a textual matter, § 2244(b) applies only where the court acts pursuant to a prisoner's application." *Calderon*, 523 U.S. at 554.

To be sure, § 2244(b) does not permit the court to entertain a petition for rehearing en banc under the guise of acting sua sponte. The question is whether the court, though it purports to act sua sponte, entertains the merits of the second habeas petition. If the court were to grant some form of substantive habeas relief or take other action on the basis of new claims or evidence in the second habeas petition, the court would subvert AEDPA by granting relief on the basis of claims that failed to satisfy the requirements of § 2244(b)(2). The Court in *Calderon*, held that this is impermissible.

> "[If] the court considers new claims or evidence presented *in a successive application for habeas relief*, it is proper to regard the court's action as based on that application. In these cases, [AEDPA] applies

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[6] Section 2244(b)(1) provides: "A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." Likewise, § 2244(b)(2) provides: "A claim presented in a second or successive application under section 2254 that was not presented in a prior application shall be dismissed" unless various exceptions are applicable. 28 U.S.C. § 2244(b).

> irrespective of whether the court characterizes the action as sua sponte." (emphasis added)

Id. at 554. At the outset, there is simply no logical way one can think of the § 2244(b)(3)(A) request for authorization itself as a successive application for habeas relief. Nevertheless, Judge Boggs manages to do just that. In his dissent, Judge Boggs writes that "[Byrd] filed a document that does not admit to being a second or successive habeas. The panel ruled that it was." *Byrd v. Collins*, 2001 U.S. App. LEXIS 21769, No. 01-3927, order of remand, at *2 (6th Cir. Oct. 9, 2001) (Boggs, J. dissenting). No, it did not. The panel decided that it was appropriate to treat Petitioner Byrd's "Motion [to] Determine Whether § 2244 of AEDPA Applies in His Case" as a request for leave to file a second petition in the district court.[7] Judge Boggs' failure to properly identify the motion before the court is critically important because, as *Calderon* teaches, the lawfulness of the court's sua sponte order turns on whether the Order of Remand was based on new claims or evidence in Byrd's second habeas petition. That the remand does not rest on Byrd's second habeas action is obvious from the simple fact that, at present, the court has not granted leave to file a second habeas petition. As a result, none of the substantive claims for habeas relief, including a *Massiah* claim regarding Byrd's Sixth Amendment right to counsel, a Brady claim regarding the deliberate use of false evidence against him, and a claim of ineffective assistance of counsel, were properly before the court under § 2244(b)(3)(A).

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[7] In its September 11, 2001 Revised Order, the panel majority states that "however cast, Byrd is seeking the permission required by 28 U.S.C. § 2244 (b)(3)(A) to file a second habeas petition." Order filed September 11, 2001 in Case No. 01-3927, at *1, n.1.

Even so, a keen eye might observe that Byrd's evidence of actual innocence forms the basis of both his request for authorization under § 2244(b)(3)(A) and the actual habeas petition he seeks to file. It is indeed true that the Brewer affidavits, in which Brewer confesses to the murder, appear in both instruments, and the en banc court did well to consider the importance of the confession as a basis for the Order of Remand. However, the remand remains on the safe side of the distinction drawn in *Calderon* because in the request for authorization, the actual innocence claim does not function like a substantive claim for relief as in *Herrera v. Collins*, 506 U.S. 390, 122 L. Ed. 2d 203, 113 S. Ct. 853 (1993).[8] Instead, it functions as a "gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim heard on the merits." *Schlup v. Delo*, 513 U.S. 298, 315, 130 L. Ed. 2d 808, 115 S. Ct. 851 (1995), i.e., it functions to satisfy the miscarriage of justice exception to the AEDPA filing requirements. The court does not act on the substantive merits of claims in the habeas petition, therefore, the Order of Remand is consistent with the rule in *Calderon*.

I conclude with one final observation on the points raised in the dissents. The key to understanding the legitimacy of the Order of Remand is to remain cognizant of the two roles the court must fulfill under AEDPA and in habeas matters generally. With AEDPA, Congress creates for the court a

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[8] The Supreme Court recognized in *Herrera* that a prisoner's claim of actual innocence functions as a substantive constitutional claim for habeas relief. The Court noted that "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim." 506 U.S. at 417.

statutory duty to refuse or permit the filing of successive habeas petitions in the district courts. Whether the court has properly discharged its duty under AEDPA remains a hotly contested issue among some members of the court. I submit that the just and lawful course of action in this case involving Petitioner Byrd becomes increasingly clear when the court is mindful that its duties under AEDPA are designed to facilitate the court's larger responsibility to see to it that the rights of citizens under the Federal Constitution are not disparaged in state criminal proceedings. Were the dissenters mindful of this basic role of the federal courts in habeas matters, they would be uncomfortable with the fact that the Petitioner has been, at every turn, refused an opportunity to test in open court what a majority of active judges on this court agrees is potentially exculpatory evidence of actual innocence.

The response from the dissenters is that Byrd has shuttled back and forth between the state and federal courts for some eighteen years. There is no disagreement on the court that he has. But, this fact is important only insofar as it explains why Byrd is unable to show cause for failing to raise his claim of actual innocence in his first federal habeas petition. It means nothing with respect to whether the Brewer confession is persuasive evidence of actual innocence that would entitle Byrd to a second opportunity to make his claim for habeas relief. The state courts of Ohio wasted an opportunity to bring all interested parties closer to fairness and finality in this matter by refusing out of hand and with no justifiable rationale Byrd's request for discovery and a hearing on this specific claim. The en banc court agrees with the view in *Burris v. Parke*, 116 F.3d 256 (7th Cir. 1997) that in these circumstances, a federal court does well when it refuses to rubber-stamp such inadequate proceedings in the state court on a habeas claim. Otherwise, "a state could insulate its

decisions from collateral attack in federal court by refusing to grant evidentiary hearings in its own courts." *Id.* at 259.

Notwithstanding the assertion of Judge Suhrheinrich, the en banc court is no more interested in obstructing the lawful imposition of the death penalty in this Circuit than is Judge Suhrheinrich in curtailing the rights of habeas petitioners in the federal courts. *Byrd v. Collins*, 2001 U.S. App. LEXIS 21769, No. 01-3927, *order of remand*, at *1 (6th Cir. Oct. 9, 2001) (Suhrheinrich, J. dissenting). We differ, apparently, with regard to the means that are necessary to fulfill our statutory and constitutional responsibilities as a federal court entertaining a habeas matter. The Order of Remand reflects the manifest resolve on the part of a majority of active judges on this court to discharge these duties to the fullest.

CONCURRING OPINION

R. GUY COLE, Jr., Circuit Judge, concurring in the Order of Remand, in which JONES, DAUGHTREY, MOORE, and CLAY, Circuit Judges, join.

I concur in the decision of this Court to join the Second and Ninth Circuits in holding that an en banc court's authority to vacate *sua sponte* the decision of a three-judge panel is not precluded by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). *See Triestman v. United States*, 124 F.3d 361, 367 (2nd Cir. 1997) ("Notwithstanding the restrictions on appealability in § 2244(b)(3)(E), this court has the authority to order a rehearing *sua sponte*); *Thompson v. Calderon*, 151 F.3d 918, 922 (9th Cir. 1998)(en banc)("the language [of 2244(b)(3)(E)] does not preclude *sua sponte* review by an en banc court. It merely precludes the parties

from seeking a rehearing.") For the reasons set forth below, this Court's decision is entirely consistent with the statutory text, legislative aims, and constitutional boundaries of AEDPA.

A.

AEDPA, in its relevant portions, provides that "the grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. § 2244(b)(3)(E)(emphasis added). While this section clearly prohibits a petitioner from requesting rehearing, nothing in its text bars a federal appellate court from rehearing a matter en banc upon its own motion. *See Calderon v. Thompson*, 523 U.S. 538, 554, 140 L. Ed. 2d 728, 118 S. Ct. 1489 (1998) ("As a textual matter, § 2244(b) applies only where the court acts pursuant to a prisoner's "application[1]".") Thus, the statute bars petitions for rehearing, not rehearing *per se*. Indeed, the conspicuous absence of any reference to en banc rehearings in this section as opposed to other sections of AEDPA, e.g. 28 U.S.C. 2266(b)(5)(B)(i), provides further support for the notion that rehearing en banc *sua sponte* is not contemplated by this

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[1] The statute makes a distinction between an "application" and a "motion." *See* 28 U.S.C. § 2244(b)(3)(A) and 28 U.S.C. 2244(b)(3)(E). An "application" is essentially a habeas corpus *petition*. *See* Liebman and Hertz, Federal Corpus Practice and Procedure 28.3d § 1992. Here, the Court is acting pursuant to its authority to rehear matters en banc *sua sponte*. Regardless, there is presently no application before this Court; we are vacating the decision of the three-judge panel based upon Petitioner's motion under 2244(b)(3)(A), seeking authorization to file a successive habeas petition.

section. *See Rodriguez v. United States*, 480 U.S. 522, 525, 94 L. Ed. 2d 533, 107 S. Ct. 1391 (1987) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in its conclusion.")(internal quotations omitted); *See also* Liebman and Hertz, Federal Habeas Corpus Practice and Procedure § 28.3d 1194-5 fn. 119. As a matter of AEDPA's text, the decision of a federal appellate court to grant a rehearing sua sponte is clearly not prohibited by the statute.

Moreover, en banc review by this Court on its own motion is also consistent with the primary aims of AEDPA. The Supreme Court, in upholding the constitutionality of AEDPA, has construed the requirements of 2244(b) to be a "gatekeeping" feature, one which prohibits successive, potentially baseless, applications by petitioners. *Felker v. Turpin*, 518 U.S. 651, 656-7, 135 L. Ed. 2d 827, 116 S. Ct. 2333 (1996) (28 U.S.C. § 2244 "concern[s] second or successive habeas corpus applications by state prisoners.") The statute thus is directed against the actions of petitioners and assigns this Court the role of gatekeeper against petitioners' successive petitions. Put simply, we are charged with ensuring that only potentially meritorious petitions are accorded review. By acting *on its own motion* en banc, this Court has not thwarted this gatekeeping purpose. We have not entertained successive petitions on the part of petitioner in this case and the underlying purposes behind this section remain unscathed.

This Court's authority to act on its own motion is also not precluded by our decision in *In Re King*, 190 F.3d 479 (6th Cir. 1999) (en banc). There, this Court held that a petitioner's motion under § 2244(b)(3)(A) for rehearing by an en banc court is barred under § 2244(b)(3)(E). *Id* at 482. The Court concluded that petitioner's motion could not be

reheard en banc as a matter of AEDPA's statutory language and legislative intent, as 2244(b)(3)(E) clearly prohibits a 'petition for rehearing" and because the purpose of the statute is to limit requests for review by petitioners. *Id.* The crux of the *King* decision, however, was not that the decision of the three-judge panel could not be reheard en banc, but rather that the petitioner was precluded from requesting such a rehearing. *Id.* Here, there is no petition of this kind before the Court. Instead, we are vacating the panel decision of our own accord.

B.

Any reading of AEDPA that precludes this Court's ability to review en banc decisions of a three-judge panel would unduly encroach upon the internal procedures of this Court. The power of an en banc court to review its own panel decisions sua sponte is inherent to its function as a reviewing court. See *Irving v. U.S.*, 162 F.3d 154, 161 (1st. Cir. 1998) ("The authority to overrule the decision of a prior panel in the same case flows logically from the error-correcting function of the full court.") In granting federal appellate courts the ability to review their own decisions en banc, Congress was deliberately broad. The operative statute, 28 U.S.C. § 46(c), requires only that "rehearing before the court in banc [sic] is ordered by a majority of the circuit judges of the circuit who are in regular active service." The Supreme Court has interpreted § 46(c) to accord federal appellate courts extensive rule-making authority with regards to reviewing matters en banc. *See Western Pacific Ry. Corp. v. Western Pacific Ry. Corp.*, 345 U.S. 247, 260, 97 L. Ed. 986, 73 S. Ct. 656 (1953)("[28 U.S.C. 46(c)] vests in the court the power to order rehearings en banc. It goes no further. It neither forbids nor requires each active member of a Court of Appeals to entertain each petition for a hearing or rehearing en banc. *The court is left free to devise its own*

administrative machinery to provide the means whereby a majority may order such a hearing.") (emphasis added). Furthermore, the Supreme Court has determined that the process by which a federal appellate court decides to rehear a matter en banc is inherently internal, beyond the review of litigants or even the Supreme Court itself. *See Shenker v. Baltimore & Ohio Railroad Company*, 374 U.S. 1, 5, 10 L. Ed. 2d 709, 83 S. Ct. 1667 (1963) ("the rights of the litigant go no farther than the right to know the administrative machinery that will be followed. . . for this Court to hold otherwise would involve it unnecessarily in the internal administration of the Courts of Appeal.") Moreover, Congress has in particular avoided interfering with an en banc court's power to rehear matters *sua sponte*. *See* Advisory Committee Notes to F.R.A.P. Rule 35 (Rule that delineates standards for determining when a rehearing en banc may be ordered "does not affect the power of a court of appeals to initiate in banc [sic] hearings *sua sponte*.")

Given the extent of power granted to this Court in determining whether to review a decision of a panel en banc, any attempt by Congress to abrogate this authority would likely run afoul of the Separation of Powers Doctrine. *See Miller v. French*, 530 U.S. 327, 341, 147 L. Ed. 2d 326, 120 S. Ct. 2246 (2000) ("the Constitution prohibits one branch from encroaching on the central prerogatives of another.") This Court avoids this issue by properly according § 2244(b)(3)(E) sufficiently narrow construction so as to preclude any "serious doubts of [its] []constitutionality." *International Association of Machinists v. Street*, 367 U.S. 740, 749, 6 L. Ed. 2d 1141, 81 S. Ct. 1784 (1961). *See also Hadix v. Johnson*, 144 F.3d 925, 938 (6th Cir. 1998) (rev'd on other grounds)(statutes should be construed "in a manner that renders the statute constitutionally valid.")

Even assuming arguendo that Congress may, within its Article I powers, alter this Court's power to review its own decisions upon its own motion, it must do so explicitly. In the absence of express language removing federal court review, a statute presumptively permits such review. *See Henderson v. INS*, 157 F.3d 106, 119 (2nd. Cir. 1998)(discussing "the well-accepted rule of statutory construction that repeals by implication of jurisdictional statutes (and particularly of the habeas statutes) are disfavored . . . [and] the presumption [is] in favor of judicial review.") *See also Felker v. Turpin*, 518 U.S. 651, 660, 135 L. Ed. 2d 827, 116 S. Ct. 2333 (1996) (Congress may not remove the Court's habeas power implicitly); *Ex Parte Yerger*, 75 U.S. 85, 105, 19 L. Ed. 332 (1868) (same). Here, Congress has not explicitly removed the ability of a federal appellate court to review en banc a panel decision *sua sponte*. This power thus is to remain unfettered, and has been properly exercised by this Court.

For the foregoing reasons, I concur in the en banc order of this Court.

DISSENTING OPINION

BOGGS, Circuit Judge, dissenting, in which SUHRHEINRICH and BATCHELDER, Circuit Judges, join.

Although some have attacked the very notion of referring to death penalty litigation as involving characteristics of a game, with tactics, moves, and rules, *see O'Guinn v. Dutton*, 88 F.3d 1409, 1413 n.1 (6th Cir. 1996) (Merritt, J. concurring), the broad definitions used in the study of "game

theory," and in legal courses on the subject, certainly apply. The condemned in almost all cases seeks to avoid allowing the legal system to reach a condition of finality, despite the very strong value that finality has, even in a death penalty case. *See McCleskey v. Zant*, 499 U.S. 467, 492, 113 L. Ed. 2d 517, 111 S. Ct. 1454 (1991).

The state almost always seeks finality -- either it will succeed in carrying out the mandates of the state legal system, or it can at least move on to some other case.

All well and good. The system provides many pathways of appeal, reconsideration and contemplation. But when federal lower courts are involved, under current statutes, upheld by the Supreme Court, it all comes down to Section 2254 -- statutory habeas corpus. *See Felker v. Turpin*, 518 U.S. 651, 662, 135 L. Ed. 2d 827, 116 S. Ct. 2333 (1996). *See also* 28 U.S.C. § 2244(b)(3)(E).

The Supreme Court specifically and unanimously upheld this scheme – in *Felker v. Turpin* it upheld all the restrictions on habeas contained in Section 2254 and AEDPA, leaving only the original writ of habeas to the Supreme Court as the avenue of the "great writ" that may not be suspended, except in cases of insurrection. *Id.* at 662-65.

So, to avoid finality, a prisoner must follow Section 2254. It gives him a full and fair habeas. Byrd has had that, from 1994 to 2000. This court considered the matter, issued an opinion, that opinion was subject to a petition for en banc rehearing, and though narrowly, Byrd did not succeed. *Byrd v. Collins*, 209 F.3d 486, *rehearing denied*, No. 96-3202, amended en banc order (6th Cir. Aug. 22, 2000). The Supreme Court denied certiorari. *Byrd v. Collins*, 531 U.S. 1082, 148 L. Ed. 2d 682, 121 S. Ct. 786 (2001).

At that point, the system clearly gives him two, and only two, options. He may move this court for permission to file a second or successive habeas. If granted that permission, he files his habeas in district court and proceeds. If his motion is denied, the denial is not subject to rehearing. Or, if he contends that under pre-AEDPA law he does not need such permission, he can file a habeas in district court, and see if the district court agrees with him. In either case, the case continues on the road to finality. Byrd has chosen to do neither. He filed a document that does not admit to being a second or successive habeas. The panel ruled that it was.

In a somewhat similar, possibly pre-AEDPA, case, Robert Coe's filing in district court to raise a *Ford* competency issue was held by the panel to be a pre-AEDPA petition that the district court was permitted to deal with. The district court ruled promptly, and the system was permitted to operate. *See Coe v. Bell*, 209 F.3d 815 (6th Cir. 2000). Byrd could have filed in district court, if he thought AEDPA doesn't apply, but he didn't.

What Byrd did instead was to file a petition for rehearing en banc of the denial. This was clearly not permitted. Nevertheless, this court issued an order, based on motions not made known to some members of the court, ordering in advance that such a petition be filed and submitted to the court. See Order filed September 11, 2001 in Case No. 01-3927. Such a petition was filed, and submitted to the court. At the request of a member of the panel, a poll on the granting of the en banc petition was ordered, and a voting ballot issued on Sept. 27.

However, on September 28, the proposition on which the court was asked to vote was changed, apparently, to be a request "to determine whether the en banc court shall, *sua sponte*" not re-hear the action of the panel and grant

permission for a second or successive habeas petition, but rather to "remand" the case to the district court "for the development of a factual record sufficient to permit a consideration of a petition to file a second petition." A majority of the active judges of the court have now supported this proposition. This action has no conceivable connection to Section 2254 jurisprudence, whatsoever.

Indeed, Byrd perhaps gives the game away in his most recent filing where he states that "this Court sits less as an appellate court and more as a fact-finder on the actual innocence claim." *See* "Motion For Leave to File a Motion Requesting Referral of His Case to a Special Master Pursuant to FRAP 48," at 8, filed September 26, 2001. Truer words were never spoken, nor words that more accurately represent how the court is failing to apply Section 2254. Byrd wants us (and apparently a majority of the court agrees) to be involved in a fact-finding process, as to matters willfully withheld from the court for over a decade, or now brought up at the last minute, when the persons involved were fully available to the defense at trial, at state habeas, and at federal habeas and never brought forth until now.

Quite simply, the claim of actual innocence, for habeas purposes, does not mean that a judge would have ruled differently had he been on the jury; or on the state bench; or on the state or federal habeas courts; it has to mean that a particular legal standard, set down in the statutes and cases we are sworn to uphold, has been met. *See Herrera v. Collins*, 506 U.S. 390, 400-01, 122 L. Ed. 2d 203, 113 S. Ct. 853 (1993).

There are a variety of ways that Byrd could have attempted to pursue those issues under the rules. He has chosen not to.

For every one of those avenues leads to finality. Instead, he, with the approval of this court, has concocted a procedure unknown to the law, where this court takes control of matters not properly before it, "remands" them to a court where they have never been, and commands that the matters then be returned to this court, in 45 days or so, for this court, only then, to consider whether permission to file a second habeas should be granted by the full court.

Subsequent to the close of the voting on the proposition stated above, *see supra* p. 2, the court has prepared a very extensive order of "remand" that only adds to the astonishing series of irregularities that have occurred in this case. First, the cited cases of *Triestman* and *Krimmel* provide no support for the ability of the entire court to "rehear" the actions of a panel with respect to a motion for permission to file a second or successive habeas petition. *See Triestman v. United States*, 124 F.3d 361 (2d Cir. 1997); *Krimmel v. Hopkins*, 56 F.3d 873 (8th Cir. 1995). Neither case involved the full court at all; both involved a rehearing by a panel of its own decisions. *Krimmel* was pre-AEDPA and involved a conventional appeal of a denial of a first habeas. *Triestman* specifically noted that § 2255 requires that "a second or successive habeas must be certified . . . by a panel of the appropriate court of appeals." *Triestman*, 124 F.3d at 365 (emphasis added) (quoting 28 U.S.C. § 2255).

This obviously is not the case here.

Next, the court's purported "remand" is not "ancillary to the petition for a writ of habeas corpus," because there is no petition until a panel of this court grants permission to file it – when it would be filed in the district court. What the court's order does is neatly avoid the conventional habeas jurisdiction of the district court, where such a petition, if and when permitted to be filed, would be directed to the judge

who has dealt with the earlier habeas petition by Byrd, or would be dealt with otherwise according to local court rules. Instead, our court in effect grants Byrd's undealt-with motion for a special master. If we can direct a particular federal judge to appoint a particular type of official to advise us, we could just as easily appoint a law school dean, the UN Commission on Human Rights, or Amnesty International to conduct such a proceeding.

Finally, under the statutes, we are simply not authorized to do anything with a motion to file a second or successive petition other than to grant it, or deny it. We cannot shirk that duty or turn it over to others to conduct "fact-finding" that we will apparently deal with in some capacity other than that assigned us by our jurisdictional statutes.

This activity has spun so far out of the authorized sequence that it may even be doubted whether the Supreme Court may be thought to have jurisdiction to stay it at this point; the answer to that question will have to await the event, should such a request be filed. What is certain is that we have embarked on a path that, if permitted, creates the ability for every appellate panel and full court to explode every limitation apparently thought, by both Congress and the Supreme Court, to be contained within AEDPA.

The court's actions are lawless, and I therefore respectfully dissent.

DISSENTING OPINION

SUHRHEINRICH, Circuit Judge, dissenting from the Order of Remand, in which BATCHELDER, Circuit Judge, joins.

In the latest twist in this case, a majority of the En Banc Court has now voted to *sua sponte* remand this case for "for the development of a factual record sufficient to permit a consideration of a petition to file a second habeas corpus petition," a "procedure" which is not found in the AEDPA. While that procedure is without legal support, the En Banc Court continues what this writer feels is a lawless course of action.

It is important that we retrace several critical steps that put us in this predicament. First, on the evening of September 10, 2001, there is a secret vote by a majority of the En Banc Court to grant Judge Jones thirty days to prepare a dissent to the original panel decision denying Byrd permission to file a second habeas petition. To date, Judge Jones has not written a dissent that sets forth his legal reasoning.

Next, on September 12, 2001, Byrd files a petition for rehearing en banc, raising two issues: First, "Does the En Banc Court have jurisdiction to review the panel's denial of Byrd's application to file a second habeas petition?" Second, "Assuming pre-AEDPA law applies, has Byrd provided clear and convincing evidence of his actual innocence such that his abuse of the writ should be excused and he should be allowed to file a second petition?" These questions have not yet been

answered, nor has there been any indication by the En Banc Court that it is even going to entertain the petition.

On September 26, 2001, Byrd files a "Motion For Leave to File a Motion Requesting Referral of His Case to a Special Master Pursuant to FRAP 48." It states in pertinent part that "this Court sits less as an appellate court and more as a fact-finder on the actual innocence claim." Not only did Byrd's attorney jump the gun in filing this motion, but he is clairvoyant because a majority of the En Banc Court thereafter adopts his suggestion in their "sua sponte" remand order. On September 27, 2001, at the request of Judge Jones, a poll for granting of the en banc petition was made, and a voting ballot was issued. On September 28, 2001, Judge Jones files a "clarification of his request for en banc vote," where he advocates that the En Banc Court should "sua sponte remand for the development of a factual record sufficient to permit a consideration of a petition to file a second habeas corpus petition."

Instead of ruling on Byrd's petition for rehearing and openly assuming control of this case, on October 4, 2001, a majority of the En Banc Court agrees to the *sua sponte* remand for fact finding. So as of today, the En Banc Court has fired the panel and taken over this case *sua sponte*. At the same time, they have not adopted a dissent to the panel decision, as there has been none, nor have they given the panel majority any guidance as to how they misinterpreted the law.

The majority makes no mention of the fact that the so-called "actual innocence" affidavit of co-defendant John Brewer has been available since 1989 and has been hidden from the courts by Byrd's attorneys. It is hard to determine the reason for these attorneys' unethical behavior; if indeed Byrd is "innocent," why put the state courts, and the federal

judiciary, including the United States Supreme Court, through years of litigation, when presumably the En Banc Court would find him innocent? Furthermore, why put Byrd through nearly eighteen years of torment as to whether he will live or die? I think the answer is clear; and that is, Byrd's attorney never thought that anyone would give credence to a criminal who testified one way under oath, in a trial, and then testified another way in an affidavit. This does not prove Byrd's innocence, it only proves that Brewer is a liar.[1]

The En Banc Court labels the "fact finding" mission "ancillary," when indeed it is the essence of his claim and goes directly to the question of whether Byrd should be allowed to file a second habeas petition. What makes this more outrageous is the majority's determination that the factual inquiry should contain the very relief that Byrd's attorneys failed to obtain in his first federal habeas petition, *see Byrd v. Collins*, 209 F.3d 486 (6th Cir. 2000), and which incidentally, failed to gain rehearing by this En Banc Court, who turned down Byrd's request for rehearing en banc. *See Byrd v. Collins*, No. 96-3202, amended en banc order (6th Cir. Aug. 22, 2000). And the United States Supreme Court denied certiorari. *See Byrd v. Collins*, 531 U.S. 1082, 148 L. Ed. 2d 682, 121 S. Ct. 786 (2001).

The uncharted course of this case continues in that the matter is sent not to the United States District Judge to whom Byrd's first federal habeas petition was assigned, but to an appointed Magistrate Judge (presumably one who will do the bidding of the En Banc Court) who is yet to be named. Under what procedure or rule of law allows the En Banc

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[1] *See United States v. Chambers*, 944 F.2d 1253, 1264 (6th Cir. 1994) ("Recanting affidavits and witnesses are viewed with extreme suspicion.").

Court to interfere with the blind draw assignment of the United States District Judge to whom it was assigned?[2]

In my view, as I read their order, which I attach to my dissent for publication, after the fact finding by the hand-picked magistrate, the case is not returned to the three-member panel, but instead is returned to five members of a nine-member court that is the so-called majority of the En Banc Court.[3] I take it then that the En Banc Court will decide if there are grounds for a second petition. One might wonder how they pull off this sleight-of-hand as the statute requires a three-judge panel of the court of appeals to decide this issue. *See* 28 U.S.C. § 2244(b)(3)(B). And that decision is nonappealable. *See* 28 U.S.C. § 2244(b)(3)(E).

What has happened, unlike any habeas corpus case ever to come before this Court, is that the En Banc Court will not act as a reviewing body of the panel, but will become the panel itself. It would be far more courageous, far more intellectually honest, if the En Banc Court would hold as

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[2] If this matter is not going back to the original panel, presumably the En Banc Court thinks the panel is tainted in some way. The En Banc Court must also believe that the United States District Judge is tainted as well, because they have assigned the matter to the Chief Judge of the Southern District of Ohio for appointment of a Magistrate Judge, thereby taking the case away from the district judge who has handled this matter since 1994. Once again, there is no indication as to what case or statute permits this procedure.

[3] If Judge Jones's concurrence in the Order of Remand is correct, would this matter not come back to the original panel, or has the En Ban Court taken complete control of the case and there will be no three-member panel as provided for in the statute?

matter of policy that the Sixth Circuit will not uphold the death penalty.

This entire unprecedented, unusual, and in my mind, illegal process has all resulted from one Judge asking for a thirty-day extension in the execution of John Byrd. All of the orders, previous decisions by the En Banc Court, and eighteen years of due process for Byrd have been thrown out the window, and a majority of this En Banc Court has ordered a fact finding on the very thing Judge Jones advocated in his dissent from the denial of Byrd's first federal habeas petition. *See Byrd v. Collins*, 209 F.3d 486, 542-52 (Jones, J. dissenting). Once again, it would be much more intellectually honest and legal if this Court would merely indicate that this En Banc Court is overruling the past En Banc Court and that the law of the case has no meaning.

While it is clear that I am out-of-step with the new jurisprudence of the Sixth Circuit, and have no understanding of that law, I will attempt to set down my legal reasoning for the reader to see how outmoded and "injudicious" my legal interpretation is. I will address what I believe are the two issues properly before the En Banc Court.

The En Banc Court Has No Jurisdiction

The statute says:

> The grant or denial of an authorization by a court of appeals to file a second or successive application *shall not* be appealable and *shall not* be subject to a petition for rehearing or for a writ of certiorari.

28 U.S.C. § 2244(b)(3)(E) (emphasis added). As we observed in the unanimous en banc decision of *In re King*, 190 F.3d 479, 481 (6th Cir. 1999) (en banc), *cert. denied*, 529

U.S. 1041 (2000), "any question on whether an en banc rehearing is available under § 2244(b)(3)(E) is foreclosed by the provision that the original panel's decision 'shall not be appealable.'"[4] As we held in that unanimous en banc decision,

> once a panel of this court grants or denies an individual permission to file a second or successive petition in the district court, § 2244(b)(3)(E) prohibits any party from seeking further review of the panel's decision, either from the original panel or from the en banc court.

King, 190 F.3d at 480. Thus, under the crystal clear language of § 2244(b)(3)(E) and the unequivocal holding of *King*[5], we do not have jurisdiction over Byrd's petition for rehearing en banc and the petition should be dismissed. *See id.* at 482.[6]

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[4] In *Felker v. Turpin*, 518 U.S. 651, 135 L. Ed. 2d 827, 116 S. Ct. 2333 (1996), the Supreme Court indicated that this limitation is constitutional. *See also* 17A Wright & Miller, FED PRAC. & PROC. § 4267 (West. Supp. 2001).

[5] It should also be pointed out that the petitioner in *King* was in an identical procedural posture to Byrd: his first federal habeas petition was filed in the district court prior to the enactment of the AEDPA, and his request for permission to file a second habeas petition was filed under § 2244 of the AEDPA. *See In re King*, 190 F.3d 479, 480 (6th Cir. 1999) (en banc), *cert. denied*, 529 U.S. 1041 (2000). In *Workman v. Bell*, 227 F.3d 331 (6th Cir. 2000) (en banc), *cert. denied*, 149 L. Ed. 2d 109, 121 S. Ct. 1194 (2001), which addressed the Workman's request to recall our mandate, we pointed out that we "had not undertaken to review" the denial of Workman's request to file a second habeas petition in the district court. *Id.* (citing and distinguishing *King*).

[6] Furthermore, in *King*, we specifically instructed as follows:

To get around this obvious bar, Byrd argues that "[he] is not asking the Court for permission to file a second habeas petition under § 2244(b) of AEDPA. His petition for rehearing en banc asks the Court to decide the preliminary jurisdictional question of whether the AEDPA even applies to his case." Byrd's Petition for Rehearing En Banc, at 4.[7] If

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> Given our decision today, the clerk of court is directed to return to any party petitions seeking a rehearing or rehearing en banc that challenge a panel's decision granting or denying a request under § 2244(b) to file a second or successive writ of habeas corpus in the district court.

In re King, 190 F.3d 479, 482 (6th Cir. 1999) (en banc), *cert. denied*, 529 U.S. 1041 (2000).

[7] Implicit in Byrd's argument is the erroneous assumption that the *procedural* requirements of the AEDPA requiring a petitioner to seek permission in the Court of Appeals to file a second petition are subject to a retroactivity analysis. As will be discussed, this assumption is flawed, because it confuses the procedural and substantive aspects of the AEDPA's gatekeeping requirements. *See generally Daniels v. United States*, 254 F.3d 1180 (10th Cir. 2001) (en banc) (considering separately the AEDPA's procedural and substantive aspects).

Byrd also claims that this Court has jurisdiction to resolve the question of the applicability of the AEDPA. In support, he cites *Mancuso v. Herbert*, 166 F.3d 97, 100 (2d Cir.), *cert. denied*, 527 U.S. 1026, 144 L. Ed. 2d 779, 119 S. Ct. 2376 (1999) for the proposition that § 2244(b)(3)(E) "does not bar petitions that ask for reconsideration of the jurisdictional question of whether the AEDPA even applies, *i.e.*, while Section 2244(b)(3)(E) governs how petitions are treated once they are properly located within the AEDPA framework, it

does not restrict our authority over the threshold question of whether the AEDPA applies." 166 F.3d at 100.

Taken out of context, *Mancuso* appears to support Byrd's position. However, in *Mancuso*, at issue was the court's recall of the mandate. After the court of appeals had granted the petitioner' s request for an order recalling the mandate, the state moved for reconsideration of that order and moved for an order denying the petitioner's motion for recall of the mandate. The Second Circuit held that the state's motion was not barred by § 2244(b)(3)(E):

> However, while Section 2244(b)(3)(E) prohibits those petitions that seek reconsideration of the merits underlying a grant or denial of a habeas petition, *see Calderon v. Thompson*, 523 U.S. 538, 140 L. Ed. 2d 728, 118 S. Ct. 1489, . . . (1998) ("In a § 2254 case, a prisoner's motion to recall the mandate *on the basis of the merits of the underlying decision* can be regarded as a second or successive application for purposes of § 2244(b)" (emphasis added)), it does not bar petitions that ask for reconsideration of the jurisdictional question of whether the AEDPA even applies . . . .

166 F.3d at 99-100.

The request in *Mancuso*, to recall the court's mandate, "is different from an application for a second petition, as the Supreme Court made quite clear recently in *Calderon v. Thompson*, 523 U.S. 538, 140 L. Ed. 2d 728, 118 S. Ct. 1489 . . . . (1998)[.]" *Workman v. Bell*, 227 F.3d 331, 333 (6th Cir. 2000) (en banc) (order) (an equally divided en banc court denying a subsequent petition to file a second habeas corpus action which was also denied by the original panel), *cert. denied*, 149 L. Ed. 2d 109, 121 S. Ct. 1194 (2001). Instead,

Byrd's characterization of the issue is correct, we lack jurisdiction over this petition because we cannot issue an advisory opinion. In other words, if the AEDPA does not apply as Byrd asserts, Byrd should have filed a new habeas petition in the district court, have it thrown out as successive, and then come to us on appeal for a determination that the AEDPA does not apply. He did not do that. Instead, he has filed for that determination without any basis for it, and is asking for an advisory opinion from us that the AEDPA does not apply, which would then permit him to just file a new petition.

Thus, if "John Byrd's Motion [to] Determine Whether 28 U.S.C. § 2244(b) of the AEDPA Applies to His Case" is anything, it must be a motion seeking permission from the court of appeals to file a second habeas corpus application under 28 U.S.C. § 2244(b)(3)(A).[8] This Court has already concluded that the AEDPA's second or successive petition procedures apply to cases in which the first habeas petition was filed before the AEDPA's enactment. *See In re Green*, 144 F.3d 384 (6th Cir. 1998) (per curiam); *In re Hanserd*, 123 F.3d 922, 924 (6th Cir. 1997). *See also In re Minarik*, 166 F.3d 591, 599 (3d Cir. 1999) ("Based on our reading of *Landgraf* and *Lindh*, we join two other courts of appeals in holding that AEDPA contains no unambiguous guidance regarding retroactive application of AEDPA's new "second or successive" petition standards and procedures to cases in which the first habeas petition was filed before AEDPA's enactment."; citing *Green*, *supra*; *Hanserd*, *supra*; and

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Byrd's motion falls squarely within the confines of our en banc decision in *King*.

[8] Because he filed his motion with this Court, Byrd has conceded that the AEDPA applies, at least procedurally. The original panel characterized this motion as a request to file a second or successive petition.

United States v. Ortiz, 136 F.3d 161, 165 (D.C. Cir. 1998)).[9] *See generally Daniels v. United States*, 254 F.3d 1180, 1188

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[9] In *Minarik*, the Third Circuit, citing *Hanserd*, rejected the petitioner's argument that subjecting him to the new procedure found in § 2244(b)(3)(A) of the AEDPA was an impermissible retroactive application of the statute.

> Minarik maintains that subjecting him to this new procedure is an impermissible retroactive application of the statute. Section 2244(b)(3)(A), however, is a change in procedural law which falls within the firmly established "procedural change" category described in *Landgraf* that may be retrospectively applied. *See Landgraf v. USI Products*, 511 U.S. 244, 275, 114 S. Ct. 1483, 128 L. Ed. 2d 229 ("Because rules of procedure regulate secondary rather than primary conduct, the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive.").
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> Because AEDPA, as read by the *Lindh* Court in the light of normal principles of statutory interpretation, calls for the application of § 2244(b)(3)(A) to cases filed after April 24, 1996, and because it is a rule of procedure that does not "attach new legal consequences to events completed before its enactment," petitioners in Minarik's position must seek permission of a Court of Appeals prior to proceeding on a second petition, even if their first petition was filed before the Act was adopted. *See In re Hanserd*, 123 F.3d 922, 934 (6th Cir. 1997) ("Inmates who wish to file a second or successive petition should first file a motion in [the Court of Appeals] requesting permission under 28 U.S.C. §§ 2244, 2255, regardless of when the first motion to vacate was filed.").

(10th Cir. 2001) (en banc) (noting that the AEDPA contains both procedural and substantive aspects). In other words, regardless of whether Byrd's first federal habeas petition was filed pre-AEDPA, he is now required to follow the procedures outlined in § 2244(b)(3)(A) before he can file a second or successive habeas petition. *See Hanserd*, 123 F.3d at 934 (6th Cir. 1997) (recognizing that regardless of when their first petitions were filed, prisoners seeking to file a second or successive habeas petition must now apply to the appropriate court of appeals as a gatekeeper under section 2244 of AEDPA).[10]

In re Minarik, 166 F.3d 591, 599-600 (3d Cir. 1999).

[10] In *In re Hanserd*, 123 F.3d 922 (6th Cir. 1997), we outlined the procedure for federal inmates who wish to file a second or successive motion to vacate sentence as follows:

> Inmates who wish to file a second or successive motion to vacate sentence should first file a motion in this court requesting permission under 28 U.S.C. § 2244, 2255 *regardless of when the first motion to vacate sentence was filed.* If the successive motion is proper under AEDPA's gatekeeping provisions, permission to file a motion in the district court will be granted . . . . If under the holding of this case permission is not needed because AEDPA's gatekeeping provision cannot be applied pursuant to *Landgraf*, this court will so indicate and will transfer the motion to the proper district court pursuant to 28 U.S.C. § 1631. *Cf.* Fed. R. App. P. 22(a). Motions for permission that fall in neither of these categories -- i.e., those that would be barred both under the old and new law and those that are barred by a previous motion filed after April 24, 1996 -- will be denied by order of this court. If either a motion requesting permission or a second or successive motion to vacate sentence is erroneously

The Tenth Circuit, citing, *inter alia, Hanserd*, expounded on this procedural aspect of the AEDPA:

> It is clearly proper to apply AEDPA's *procedural* framework to all second or successive habeas applications filed after the Act's effective date. The presumption against retroactivity contains a well-established exception for rules of procedure, since procedural rules "regulate secondary rather than primary conduct" and avoid attaching new legal consequences to earlier actions. *Landgraf*, 511 U.S. at 275, . . . *see also Slack v. McDaniel*, 529 U.S. 473, 482, 120 S. Ct. 1595, 146 L. Ed. 2d 542 . . . *Minarik*, 166 F.3d at 599 (AEDPA's establishment of courts of appeals as gatekeepers "is a change in procedural law which falls within the firmly established 'procedural change' category described in *Landgraf* that may be retrospectively applied"). That a would-be petitioner must apply to a gatekeeping court of appeals for permission to file a subsequent habeas petition, rather than directly to a district court, does not affect the petitioner's underlying legal rights; it merely speaks to which court will consider his application. *See Graham v. Johnson*, 168 F.3d 762, 782 (5th Cir. 1999) ("Substituting the court of appeals for the district court as a gatekeeper against abusive or procedurally defaulted claims would seem to raise no retroactivity concerns. A litigant has no reasonable expectation that a particular tribunal will adjudicate his claims."). Consequently, regardless of when their

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> filed in district court, that court should transfer that motion to this court under 28 U.S.C. § 1631. *See In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997).

Hanserd, 123 F.3d at 934.

> first petitions were filed, prisoners must turn to our court as a gatekeeper under section 2244 of AEDPA. *See Minarik*, 166 F.3d at 599-600; *In re Hanserd*, 123 F.3d at 934; *accord United States v. Gallegos*, 142 F.3d 1211, 1212 (10th Cir. 1998) (per curiam) ("Because [petitioner's third § 2255] motion was filed after . . . the effective date of AEDPA, he was required to comply with the Act and obtain prior authorization from this court before filing in the district court.").

Daniels, 254 F.3d at 1188-89. *See also Felker v. Turpin*, 518 U.S. 651, 664, 135 L. Ed. 2d 827, 116 S. Ct. 2333 (1996) ("The Act requires a habeas petitioner to obtain leave from the court of appeals before filing a second habeas petition in the district court. But this requirement simply transfers from the district court to the court of appeals a screening function which would previously have been performed by the district court as required by 28 U.S.C. § 2254 Rule 9(b)."); *King*, 190 F.3d at 482 ("As the Supreme Court noted in *Felker* . . . the statute transfers from the district court to the court of appeals a screening process previously performed by the district court under Rule 9(b) of the Rules Governing § 2254 Cases in the United States District Courts.").

In short, Byrd's request to file a second habeas petition in the district court arises under § 2244(b)(3)(A) of the AEDPA as a matter of procedure and is therefore not subject to a retroactivity analysis. Because it falls within the procedural gatekeeping requirements of the AEDPA, it is subject to § 2244(b)(3)(E)'s ban on petitions for rehearing. Thus, the panel's decision on whether the AEDPA's new *substantive* gatekeeping standards would have an impermissible retroactive effect if applied in Byrd's case is not subject to en banc review. See § 2244(b)(3)(E); *King, supra.*

This should end the matter.

Even if the En Banc Court Had Jurisdiction, Byrd is Not Exempted From the AEDPA's Substantive Standards

In *Hanserd* and progeny, we recognized that if the application of the AEDPA substantive standards would have an "impermissibly retroactive effect" on pending cases, then pre-AEDPA law should govern. This Court has explicitly limited *Hanserd*, however. In *In re Sonshine*, 132 F.3d 1133 (6th Cir. 1997) (order), we held:

> Because the *Hanserd* court's *Landgraf* analysis was based upon the retroactive effect that AEDPA had on the movant's particular claim, the *Hanserd* holding must be similarly circumscribed. Consequently, while *Hanserd* is not strictly limited to claims arising under *Bailey*, apart from that class of claims, there will be few other cases "in which a difference matters," *Hanserd*, 123 F.3d at 934 n.21, and on which the gatekeeping requirements of AEDPA will thus have an impermissibly retroactive effect.

Id. at 1135. Judge Moore, who authored *Hanserd*, was a member of the unanimous *Sonshine* panel. *See also Green*, 144 F.3d 384 (holding that the Supreme Court's *Old Chief* decision is not retroactive inasmuch as it announced a new rule of law) (order; Kennedy, Contie, Moore, JJ.). Again, in *Coe v. Bell*, 209 F.3d 815 (6th Cir.), *cert. denied*, 529 U.S. 1084, 146 L. Ed. 2d 516, 120 S. Ct. 1716 (2000), Judge Moore wrote:

> In *Hanserd*, we concluded that where AEDPA's gatekeeping provision prohibiting second or successive habeas applications prevents a prisoner

> from bringing a *Bailey* claim under § 2255 but where the claim could have been raised in a subsequent application under the pre-AEDPA law, AEDPA's gatekeeping provision has an impermissible retroactive effect and is not applicable to the *Bailey* claim. *See Hanserd*, 123 F.3d at 929-34. This court subsequently limited its holding in *Hanserd* to the particular claim in that case and concluded that "while *Hanserd* is not strictly limited to claims arising under Bailey, apart from that class of claims, there will be few other cases 'in which the difference matters' and on which the gatekeeping requirements of AEDPA will thus have an impermissibly retroactive effect." *In re Sonshine*, 132 F.3d 1133, 1135 (6th Cir. 1997) (quoting *Hanserd*, 123 F.3d at 934 n. 21). . . *In light of our Sonshine decision, we cannot accept Coe's interpretation of the Hanserd decision as holding that AEDPA has an impermissible retroactive effect whenever AEDPA's standard of review, applied to an application filed after AEDPA's effective date, results in a decision that would have been different under the pre-AEDPA standard of review.*

209 F.3d at 822-23 (emphasis added).

In *Hanserd*, the petitioner's *Bailey* claim was not available when he filed his first petition because Bailey had not yet been decided. The *Hanserd* court concluded that applying § 2244(b)(2) of the AEDPA would work an impermissibly retroactive effect on Hanserd's second habeas petition, because under the pre-AEDPA, abuse-of-the-writ standard, Hanserd would have been allowed to raise his *Bailey* claim, but under the AEDPA he would not. For this reason, Hanserd did not need permission from this Court to file a second habeas petition in the district court.

Although *Hanserd* "is not strictly limited to claims arising under Bailey," *Sonshine*, 132 F.3d at 1134-35, we made clear that, "apart from that class of claims," there will be few cases in which application of pre-AEDPA vs. the AEDPA makes a difference. *Id.* Byrd's "actual innocence" claim is not within that "class of claims" because, unlike Hanserd's *Bailey* claim, and like the claims in *Sonshine* and *Green*, Byrd could have raised it in his first federal petition, and would have been subject to the abuse-of-the-writ standard under pre-AEDPA law. In rejecting the petitioner's request in *Sonshine*, we stated: "Although couched in Sixth Amendment terms, the issue is basically one arising under the Sentencing Guidelines, which would be barred under both AEDPA and the old abuse-of-the-writ standard. Sonshine would not have prevailed under pre-AEDPA law, as his petition would have been denied as an abuse of the writ." *Id.* at 1135. In rejecting the petitioner's request in *Green*, we held:

> Even if *Old Chief* did not announce a "new rule" because it was dictated by precedent, and thus should be retroactively applicable to this case, AEDPA would still be applicable to this case, because doing so would not have a retroactive effect on Green's pre-AEDPA conduct. This is so because Green would not have been able to establish cause to excuse his failure to assert his claim in his first pre-AEDPA § 2255 motion to vacate. If *Old Chief* was dictated by precedent, then his claim would not have been considered "novel," so as to establish cause to excuse his failure to assert this claim in his first motion to vacate. . . .
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> Thus, even if *Old Chief* did not announce a new rule, applying AEDPA to this case would not have had a retroactive effect on pre-AEDPA conduct. Green

> would be barred from asserting this claim in a pre-AEDPA motion to vacate under the abuse of the writ doctrine, as he would not have been able to establish cause to excuse his failure to present this claim in his first motion to vacate . . . .

Green, 144 F.3d at 387-88.

Byrd could have raised his actual innocence claim in his first federal habeas petition because (1) he obtained the Brewer affidavit in 1989 and did not file his first petition until 1994, and (2) it was well established by this time that the actual innocence/fundamental miscarriage of justice exception would excuse a procedural default, as well as an abuse of the writ. *See, e.g., Coleman v. Thompson*, 501 U.S. 722, 750, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991) (procedural default context); *Sawyer v. Whitley*, 505 U.S. 333, 120 L. Ed. 2d 269, 112 S. Ct. 2514 (1992) (abuse of writ context). In other words, Byrd cannot avail himself of the *Hanserd* exception because he could have raised his actual innocence claim in his first federal habeas petition, but chose not to. Thus, under pre-AEDPA law, Byrd's claim would be rejected as an abuse-of-the-writ. *See McCleskey v. Zant*, 499 U.S. 467, 493-94, 113 L. Ed. 2d 517, 111 S. Ct. 1454 (1991) (stating that to establish cause to excuse the failure to include a claim in the initial petition, the petitioner must show that "some objective factor *external to the defense* impeded counsel's efforts to raise the claim" in the prior petition. *Id.* at 493-94 (emphasis added).[11] In other words, this is not a case "in which a difference matters."

Nor can Byrd take advantage of the actual innocence exception to the abuse-of-the-writ standard. Under either the

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[11] In fact, Byrd's attorney indicated to the press that he has had the Brewer affidavit since 1989.

Schlup[12] standard (the petitioner "must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence") or the *Sawyer*[13] standard (the petitioner "must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law"), Byrd's procedural actual innocence claim fails.[14] As detailed in the majority opinion, the 1989

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[12] *Schlup v. Delo*, 513 U.S. 298, 130 L. Ed. 2d 808, 115 S. Ct. 851 (1995). In *Schlup*, the Supreme Court reiterated that "the meaning of actual innocence as formulated by *Sawyer* and *Carrier* does not merely require a showing that a reasonable doubt exists in the light of the new evidence, but rather that no reasonable juror would have found the defendant guilty." *Id.* at 329.

[13] *Sawyer v. Whitley*, 505 U.S. 333, 120 L. Ed. 2d 269, 112 S. Ct. 2514 (1992).

[14] Byrd argues that the majority misunderstood Ohio law and applied the wrong "actual innocence" test in *Sawyer*. Byrd claims that under Ohio's statute in 1983, the jury was required to convict a capital defendant of the principal offender aggravating circumstance in R.C. 2929.04(B)(7) at the guilt/innocence phase of trial. *See* former R.C. 2929.03(B). Thus, according to Byrd, had he been acquitted of this aggravator, he was not death-eligible. In other words, without the aggravating circumstance, he would have been guilty "only" of aggravated murder and would have been sentenced only to a "soft" twenty to life term, with parole eligibility at about fourteen years. Byrd further contends that with the aggravator, he could at best hope for a term of at least twenty years to life. Thus, according to Byrd, the principal offender aggravator in Ohio was not merely a "sentence enhancer" as in *Sawyer*. Thus, in Byrd's view, *Schlup* is the correct test.

Although, for the sake of the argument, I have analyzed this claim under *Schlup*, I do not agree that *Schlup* is the correct test. As the Supreme Court pointed out in *Calderon v. Thompson*, 523 U.S. 538, 560, 140 L. Ed. 2d 728, 118 S. Ct. 1489 (1998):

> The *Sawyer* standard has a broader application than is at first apparent. As the Court explained in *Schlup*, when a capital petitioner challenges his underlying capital murder conviction on the basis of an element that "function[s] essentially as a sentence enhancer," the *Sawyer* "clear and convincing" standard applies to the claim. *Schlup, supra*, at 326 . . . . Thus, to the extent a capital petitioner claims he did not kill the victim, the *Schlup* "more likely than not" standard applies. To the extent a capital petitioner contests the special circumstances rendering him eligible for the death penalty, the *Sawyer* "clear and convincing" standard applies, irrespective of whether the special circumstances are elements of the offense of capital murder or, as here, mere sentencing enhancers.

Calderon v. Thompson, 523 U.S. 538, 560, 140 L. Ed. 2d 728, 118 S. Ct. 1489 (1998).

In our opinion affirming the denial of his first habeas petition, we observed:

> Petitioner also was charged with two death penalty specifications; i.e., that he was the "principal offender" who committed the aggravated murder of Monte Tewksbury while committing or attempting to commit the aggravated robbery of King Kwik, as well as the aggravated robbery of Monte Tewksbury himself.

Brewer affidavit contradicts Brewer's own trial testimony, is suspect because it was not made until after double jeopardy had attached to both Brewer's and Byrd's convictions, and is inconsistent with Woodall's dying declaration. As we noted in the panel opinion, this evidence is hopelessly contradictory, both internally, and as between the two codefendants. On the basis of this evidence, it cannot possibly be concluded that it is more likely than not that any reasonable juror would have convicted Byrd in light of this evidence, let alone that this is clear and convincing evidence that would allow us to conclude that no reasonable juror would have found Byrd eligible for the death penalty.

Byrd's "new" evidence is completely unlike the evidence of actual innocence presented in *Schlup*. In *Schlup*, the new evidence included sworn statements of several eyewitnesses that Schlup was not involved in the crime. Furthermore, Schlup presented statements from an inmate who had reported that he sent out the distress call shortly after the disturbance caused by the murder, and a prison guard who testified that Schlup had been in his presence for two and half

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FN2. In Ohio, the "principal offender" means the "actual killer." *State v. Penix*, 32 Ohio St. 3d 369, 513 N.E.2d 744, 746 (Ohio 1987).

Byrd, 209 F.3d at 496.

Finally, it must be noted that in his motion before the panel, Byrd argued merely that he was "innocent of the death penalty." Byrd's Memorandum in Support, at 1-2, 46 n.20. Significantly, Byrd is not claiming that he is innocent of aggravated murder; simply that he was not the "principal offender." It is this specification that warranted the death penalty.

In any event, Byrd's claim fails under either standard.

minutes on his way to the dining room, and that he was not out of breath. These facts created doubt as to whether Schlup could have participated in the murder and still arrived in the prison dining room 65 seconds before the distress call was received (a fact which had been caught on videotape). As the Supreme Court observed, if these facts were true, "it surely [could not] be said that a juror, conscientiously following the judge's instructions requiring proof beyond a reasonable doubt, would vote to convict." *Schlup*, 513 U.S. at 331.

Schlup instructs that the court must "assess the probative force of the newly presented evidence in connection with the evidence of guilt adduced at trial." *Id.* at 332. As part of this analysis, "the court may consider how the timing of the submission and the likely credibility of the affiants bear on the probable reliability of that evidence." *Id.* Here of course, the timing of Brewer's first affidavit is highly suspect, because he made it only after he and Byrd had both been convicted and were covered by double jeopardy. By 1989, Brewer had nothing to lose, and he could exculpate Byrd in the process. *See Drew v. Scott*, 28 F.3d 460, 463 (5th Cir. 1994) ("we still have little confidence in [the codefendants] postsentencing truth experience because he had nothing whatsoever to lose by incriminating himself after receiving a 60-year sentence"; rejecting the state prisoner's "new evidence" in the form of recently-obtained statement of a third prisoner claiming that he heard the codefendant take sole credit for the murder before he pled guilty to that murder); *United States v. Vergara*, 714 F.2d 21, 23 (5th Cir. 1983) (holding that the district court may deny the defendant a new trial, without an evidentiary hearing, if it determines that a previously silent accomplice's postconviction willingness to exculpate his codefendant is not credible); *Drew v. State*, 743 S.W.2d 207, 228 (Tex. Ct. Crim. App. 1987) ("It is not unusual for one of two convicted accomplices to assume the entire fault and thus exculpate his

codefendant by the filing of a recanting affidavit or other statement."). If the Brewer affidavit is to be believed, we are in the odd position of having two defendants admittedly at the scene, a dead body, but no convicted murderer.

The Brewer affidavit also lacks credibility because it is inconsistent with his sworn testimony. *Cf. United States v. Chambers*, 944 F.2d 1253, 1264 (6th Cir. 1994) ("Recanting affidavits and witnesses are viewed with extreme suspicion."). Brewer's proven status as a liar *in this very case* weighs heavily against the probable reliability of his 1989 and 2001 affidavits. Furthermore, it is inconsistent with Woodall's dying declaration, which happens to be consistent with Brewer's trial testimony. Even under the more lenient *Schlup* standard, it simply cannot be said that no juror would vote to convict on the basis of Brewer's 1989 affidavit, because it contradicts his earlier testimony under oath, and because it is inconsistent with all-but-one of Woodall's statements over the years.

Quite simply, Byrd cannot meet the pre-AEDPA actual innocence standard because the only "new" evidence he has is the affidavit of a proven liar. The probative force of the Brewer affidavit is de minimis. Brewer's changing testimony cannot come close to meeting the actual innocence articulated in either *Sawyer* or *Schlup*.

Byrd also cavalierly attempts to introduce affidavits of eight former inmates, who claim that Armstead lied. Byrd claims that "this is not rehash of an old claim. It is not the initial habeas claim that Armstead had an undisclosed deal. Rather, these affidavits are new evidence, not presented at trial or in the original habeas, and they support a new claim--Ronald Armstead's crucial testimony was a lie, deal or no deal." Byrd's Petition, at 7-8 n.2. These affidavits may be new, but they do not support a new claim, as the following

passage in the panel decision in Byrd's appeal from the denial of his first habeas petition reveals:

> On appeal, Petitioner posits several challenges to Armstead's testimony. . . . Second, Petitioner alleges that Armstead's testimony about Petitioner's confession was false in all material respects. In support of his position, Petitioner presented affidavits from several individuals who were incarcerated with Armstead and Petitioner in the Cincinnati Workhouse in the Spring of 1983. Petitioner asserts that these affidavits show that Armstead and another inmate, Virgil Jordan, were involved in a scheme to testify falsely against Petitioner in order to further their own causes with the Hamilton County Prosecutor's Office.

Byrd v. Collins, 209 F.3d 486, 500 (6th Cir. 2000), *cert. denied*, 531 U.S. 1082, 148 L. Ed. 2d 682, 121 S. Ct. 786 (2001). As we noted in the panel decision, Byrd's renewed attacks on Armstead's credibility are barred under § 2244(b)(1) ("A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed."). Byrd's attempt to otherwise throw this evidence into the mix is utterly improper.

The Policies Underlying Habeas Jurisprudence Direct That This Case Come to an End

In addition to contravening the express directive of the AEDPA, the En Banc Court's consideration of this case runs counter to the strong policy concerns that underlie federal habeas jurisprudence. The Supreme Court recently reiterated these principles in *Calderon*:

> In light of "the profound societal costs that attend the exercise of habeas jurisdiction," *Smith v. Murray*, 477 U.S. 527, 539, 91 L. Ed. 2d 434, 106 S. Ct. 2661 (1986), we have found it necessary to impose significant limits on the discretion of federal court to grant habeas relief. *McCleskey v. Zant*, 499 U.S. 467, 487, 113 L. Ed. 2d 517, 111 S. Ct. 1454 (1986).
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> These limits reflect our enduring respect for "the State's interest in the finality of convictions that have survived direct review within the state court system." [*Brecht v. Abrahamson*, 507 U.S. 619, 635, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993)] . . . Finality is essential to both the retributive and the deterrent functions of criminal law. "Neither innocence nor just punishment can be vindicated until the final judgment is known." *McCleskey*, 499 U.S. at 491. "Without finality, the criminal law is deprived of much of its deterrent effect." *Teague v. Lane*, 489 U.S. 288, 309, 103 L. Ed. 2d 334, 109 S. Ct. 1060.
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> Finality also enhances the quality of judging. There is perhaps "nothing more subversive of a judge's sense of responsibility, of the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging well, than an indiscriminate acceptance of the notion that all the shots will always be called by someone else." Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 451 (1963).
>
> Finality serves as well to preserve the federal balance. Federal habeas review of state convictions frustrates "'both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.'" *Murray v. Carrier*, *supra*, 477

> U.S. 478, 487, 106 S. Ct. 2639, 91 L. Ed. 2d 397[.] . . . "Our federal system recognizes the independent power of a State to articulate societal norms through criminal law; but the power of a State to pass laws means little if the State cannot enforce them." *McCleskey*, 499 U.S. at 491.

Calderon, 523 U.S. at 554-56 (some internal citations and quotation marks omitted).

A decision by the En Banc Court to hear this case will not only be contrary to the rule of law, as clearly defined by the AEDPA, but will violate important principles of habeas jurisprudence.

For all the foregoing reasons, and those set forth in the opinion denying Byrd's appeal from the denial of his first habeas petition, see *Byrd v. Collins*, 209 F.3d 486 (6th Cir. 2000), *en banc rehearing denied*, *Byrd v. Collins*, No. 96-3202, *amended en banc order* (6th Cir. Aug. 22, 2000), *cert. denied*, 531 U.S. 1082, 148 L. Ed. 2d 682, 121 S. Ct. 786 (2001), as well as the panel decision denying Byrd's request for permission to file a second habeas petition, *see Byrd*, ___ F.3d ____, 2001 U.S. App. LEXIS 20291, No. 01-3927 (6th Cir. Sept. 11, 2001), I submit that Byrd's petition for rehearing en banc should be denied, and that the *sua sponte* remand is improper. I therefore dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 01-3927

In re: JOHN W. BYRD, JR.,
Movant.

Filed: September 10, 2001

Before: JONES, SUHRHEINRICH and
BATCHELDER, Circuit Judges.

ORDER DENYING JOHN BYRD'S MOTION TO DETERMINE WHETHER 28 U.S.C. § 2244(b) OF THE AEDPA APPLIES TO HIS CASE, AND GRANTING A TEMPORARY STAY OF EXECUTION UNTIL SEPTEMBER 18, 2001.

SUHRHEINRICH, Circuit Judge. Movant John W. Byrd, scheduled to be executed by the State of Ohio on September 12, 2001 at 10 a.m., seeks a stay of execution while he pursues a second federal habeas petition.[1] Byrd also

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[1] Byrd does not characterize his motion as such. Rather, the motion is styled as "John Byrd's Motion [to] Determine Whether 28 U.S.C. § 2244(b) of the AEDPA Applies to His Case." As relief, he requests that "this Court [] determine that

asks this Court to determine that 28 U.S.C. § 2244(b), the Anti-Terrorism and Effective Death Penalty Act, "AEDPA," which bars second or successive petitions unless they are based on facts which could not have been discovered previously through the exercise of due diligence, does not apply to him. For the following reasons, Byrd's motion for stay of execution is **DENIED,** but the execution will be stayed until September 18, 2001, upon the request of a panel member for additional time to consider the matter. Byrd's request to file a second habeas petition is also **DENIED** as barred under § 2244(b) of the AEDPA.

I.

Byrd was convicted by a jury and sentenced in 1983. He was originally scheduled to be executed on January 27, 1984. Byrd's convictions and sentences were upheld on direct appeal to the Ohio Court of Appeals, *see State v. Byrd*, No. C-830676, B-831662 (Ohio Ct. App. Feb. 5 1986), on direct appeal to the Ohio Supreme Court, *see State v. Byrd*, 512 N.E.2d 611 (Ohio 1987), and the Supreme Court denied certiorari. *See Byrd v. Ohio*, 484 U.S. 1037 (1988). Byrd also filed a motion for a new trial in December 1983, which the trial court denied in September 1989. The Ohio Court of Appeals upheld the trial court, *see State v. Byrd*, No. C-

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§ 2244 of the AEDPA does not apply to him." In the alternative he "asks the Court to grant a stay and remand his case to the district court for an evidentiary hearing into whether his evidence meets *Schlup's* actual innocence gateway standard for filing a second petition." He also states that "[i]f the Court determines that § 2244(b) does not apply to Byrd's case, he will immediately file in the district court the second habeas petition he tendered to this motion." However cast, Byrd is seeking the permission required by 28 U.S.C. § 2244(b)(3)(A) to file as second habeas petition.

890659 (Ohio Ct. App. Feb. 13, 1991), and the Ohio Supreme Court subsequently declined jurisdiction. *See State v. Byrd*, 574 N.E.2d 1092 (Ohio 1991).

In 1988 Byrd filed his first petition for state postconviction relief, which the trial court denied. The Ohio Court of Appeals reversed in 1991 and remanded the case for further proceedings. On remand the trial court again entered summary judgment for the state, and Byrd appealed. The Ohio Court of Appeals affirmed, *see State v. Byrd*, No C-910340 (Ohio Ct. App. Feb. 26, 1992), and the Ohio Supreme Court declined jurisdiction. *See State v. Byrd*, 596 N.E.2d 472 (Ohio 1992).

Byrd filed his initial petition for writ of habeas corpus under 28 U.S.C. § 2254(d) on March 7, 1994. The district court denied an evidentiary hearing and habeas relief in 1995. *Byrd v. Collins*, No. C-1-94-167, slip. op. (S.D. Ohio July 28, 1995); *Byrd v. Collins*, No. C-1-94-167, slip. op. Nov. 2, 1995). Last year, over dissent, this Court affirmed the judgment of the district court. *Byrd v. Collins*, 209 F.3d 486 (6th Cir. 2000).[2] A divided court denied Byrd's petition for rehearing *en banc*. *Byrd v. Collins*, No. 96-3202, *amended en banc order* (6th Cir. Aug. 22, 2000). The United States Supreme Court denied Byrd's petition for writ of certiorari on January 8, 2001. *Byrd v. Collins*, 531 U.S. 1082 (2001). The district court subsequently issued a mandate dismissing Byrd's habeas petition on January 25, 2001.

On January 26, 2001, Byrd filed a motion in the Ohio Supreme Court seeking a stay of execution to permit him to litigate the issue of his actual innocence of the death penalty. On March 20, 2001, the Ohio Supreme Court issued an entry

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[2] For a thorough review of the underlying events, *see Byrd v. Collins*, 209 F.3d 486 (6th Cir. 2000), *cert. denied*, 531 U.S. 1082 (2001).

permitting Byrd to file a second state post-conviction petition in the trial court and remanding the case for a hearing on the claim that he was actually innocent of the death penalty. The Ohio Supreme Court's entry set Byrd's execution date for September 12, 2001. *State v. Byrd*, 744 N.E.2d 190 (2001).

Byrd filed a petition for post-conviction relief in the Hamilton County, Ohio, trial court on April 9, 2001. In it he raised, *inter alia*, the claim that he was actually innocent of the death penalty. Byrd based his first claim on the 1989 affidavit of co-defendant John Brewer, in which Brewer alleges that he, not Byrd, actually murdered Monte Tewksbury. In his second claim Byrd alleged that the trial testimony of state's witness Ronald Armstead and the grand jury testimony of state witness Virgil Jordan were not credible. He also requested discovery of records from the prosecutor's office and the state department of corrections. The trial court denied Byrd's discovery requests and dismissed Byrd's post-conviction petition without an evidentiary hearing on May 25, 2001. *State Byrd*, No. B-831662(A) (Hamilton C.P. May 25, 2001). Regarding the Brewer affidavit, the court held:

> Byrd and his attorneys agree that they received Brewer's 1989 affidavit in 1989. For tactical reasons, they did not file the affidavit or make it known to this or any court at that time even though Byrd had a motion for a new trial pending at that time. Byrd, in 1989, was pursuing an appeal and a motion for new trial contending in part that Byrd was not even at the scene of the crime on the night in question. Brewer's affidavit puts Byrd squarely at the crime scene.
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> As a consequence of this tactical decision by Byrd and his attorneys, Byrd is now barred, under Criminal Rule 33, from filing a motion for a new trial because,

as his attorney conceded in oral argument, the 1989 affidavit is not newly discovered evidence.

Byrd and his attorneys now insist that the 1989 affidavit is true. Thus, Byrd concedes that the position he pursued in court for so long, that he was not at the crime scene, is untrue. Byrd now concedes that he was there but that Brewer, not Byrd, stabbed the victim.

The affidavit of Brewer in 1989 lacks any credibility whatsoever. The 1989 affidavit is inconsistent with his 2001 affidavit to say nothing of his sworn testimony at his trial. As the State accurately points out, Brewer continued to make statements identifying Byrd as the principal offender well into his period of incarceration to a variety of people. The Brewer affidavit lacks any credibility for a variety of reasons including those cited by the State during oral argument. The affidavits fail to meet the standard set forth in *Herrera v. Collins*, 506 U.S. 390 (1993).

The trial court ruled that the claim of actual innocence based on Armstead's lack of credibility was barred by res judicata.

The Ohio Court of Appeals affirmed the trial court's judgment on August 21, 2001. *State v. Byrd*, No. C-010379, 2001 WL 950185 (Hamilton Ct. App. Aug, 21, 2001) (per curiam). The appeals court stated in relevant part:

In his first claim for relief, Byrd contended that he was "actually innocent" of aggravated murder because his co-defendant John Brewer killed Tewksbury. Byrd cited to portions of the trial transcript and material adduced at his trial to demonstrate that Brewer was the killer. Byrd additionally presented two affidavits

> signed by Brewer on May 16, 1989, and January 24, 2001, respectively, in which Brewer claimed that he, and not Byrd, fatally stabbed Tewksbury. Byrd also presented the affidavit of Dan Cahill, a fellow inmate of Brewer at the Southern Ohio Correctional Facility, who claimed that Brewer had told him that he murdered Tewksbury.
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> . . .
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> In this case, the trial court dismissed Byrd's claim of "actual innocence" for two reasons: first, because it did not give rise to a constitutional violation in the proceedings that resulted in his conviction; and second, because the evidentiary basis for the claim-John Brewer's statement that he had actually killed Tewksbury--"lacked any credibility whatsoever." We agree. . . . With respect to the second reason, we note, under *Herrera*, *supra*, that the evidentiary threshold for a claim of actual innocence is "extraordinarily high." On the state of the record in this case, the trial court was entitled to conclude that the evidence provided by Byrd in the affidavits fell "far short" of that which would have been necessary to make out a cognizable constitutional claim.

- N.E.2d at - , 2001 WL 950185, at * 5-7 (footnote omitted). The Ohio Court of Appeals also agreed with the trial court's conclusion that Byrd's second claim challenging Armstead's credibility was barred by res judicata because it had been raised at his trial, on appeal, in his first postconviction petition, and in federal habeas corpus proceedings.

On August 29, 2001, the Ohio Supreme Court declined jurisdiction and dismissed the appeal "as not involving any substantial constitutional question." *State v. Byrd*, Case No. 01-1515 (August 29, 2001).

II.

Under the AEDPA, a petitioner is required, prior to filing a second or successive habeas corpus petition in the district court, to seek authorization "in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U.S.C. § 2244(b)(3)(A).[3] Under the AEDPA, a second or successive habeas corpus application under § 2254 that was not presented in a prior application "shall be dismissed unless" the applicant shows "the factual predicate" for his new claim of innocence "could not have been discovered previously through the exercise of due diligence," or that the claim "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2244(2)(A) & (B).[4]

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[3] Under 28 U.S.C. § 2244(b)(3)(C), "[t]he court of appeals may authorize the filing of a second or successive application only if it determines that the application makes prima facie showing that the application satisfies the requirements of this subsection." Furthermore, "[t]he grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. § 2244(b)(3)(E). *See also In re King*, 190 F.3d 479 (6th Cir. 1999) (en banc) (holding that denial of permission to file a second or successive habeas petition under AEDPA is not subject to en banc review). Although Byrd's initial federal habeas petition predated the effective date of the AEDPA, this attempt at filing a second habeas petition is clearly governed by the AEDPA. *Cf. Slack v. McDaniel*, 529 U.S. 473 (2000) (holding that an appeal from the dismissal of a habeas corpus petition after the effective date of the AEDPA is governed by AEDPA, regardless of whether the habeas petition was filed in the district court

Byrd does not rely on a new rule of constitutional law and he openly admits that he cannot establish that the factual predicate for his new claim is newly discovered. *See* Byrd's Memorandum in Support at 17 ("John Byrd has not claimed and could not claim that he has *newly discovered* evidence of actual innocence of the death penalty as defined in § 2244(b) of AEDPA.") (Emphasis in original.) This is the case because Byrd deliberately chose not to use his proof of actual innocence - Brewer's statements - in support of his initial state post-conviction petition, and he likewise chose not to cite Brewer's affidavit in his first federal habeas petition. Thus, as Byrd concedes, he cannot satisfy § 2244(b)'s requirements.

Instead, he argues that under pre-AEDPA "abuse of the writ" decisions, habeas petitioners were allowed to file second or successive petitions raising claims that were or could have been raised earlier when the petitioner met the "actual innocence/fundamental miscarriage of justice" exception, as defined by the Supreme Court in *McCleskey v. Zant*, 499 U.S. 467, 494-95 (1991), and *Schlup v. Delo*, 513 U.S. 298 (1995). Byrd asserts that the pre-AEDPA "abuse of the writ" standard, rather than § 2244(b), should apply to his case because his initial habeas petition was filed prior to the effective date of the AEDPA, and the application of the AEDPA standards would have an "impermissibly retroactive

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before or after AEDPA's effective date). *See also Steward v. Martinez-Villareal*, 523 U.S. 637, 643 (1998) (noting that had the prisoner's current request for relief been a second application, it "plainly should have been dismissed" under § 2244(b) of the AEDPA, even though his initial federal habeas petition was filed in 1993, prior to the enactment of the AEDPA).

[4] Section 2244(b)(2) contains a third basis for permitting a second or successive petition, that is not relevant in this case.

effect." He cites our decisions in *In re Hanserd*, 123 F.3d 922 (6th Cir. 1997) and *In re Sonshine*, 132 F.3d 1133 (6th Cir. 1997) in support of his argument.

Our initial inquiry is whether provisions of the AEDPA apply to this case. *See In re Green*, 144 F.3d 384, 385 (6th Cir. 1998) (per curiam).[5]

> When a case implicates a federal statute enacted after the events in suit, and Congress has not expressly prescribed the statute's proper reach, the court must determine whether the new statute would have a retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280-81 . . . (1994).

Id. at 386. In *Hanserd*, we determined that Congress has not expressed any clear intent as to the statute's proper reach. *See Hanserd*, 123 F.3d at 924. We must therefore determine whether the provisions of the AEDPA apply to this case, resorting to *Landgraf's* default rules to decide whether AEDPA may be applied here. *See id.*

In *Hanserd*, the petitioner, who pleaded guilty to using a firearm in a drug trafficking offense, in violation of 18 U.S.C. § 924(c), filed his initial § 2255 in 1995, arguing that his drug conviction violated the Double Jeopardy Clause. The district court denied the motion in July 1995, and we affirmed on appeal. *See Hanserd v. United States*, 89 F.3d 833, 1996 WL 316491 (6th Cir. June 10, 1996). While that appeal was pending, the Supreme Court announced its

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[5] Byrd likewise acknowledges that this question must be decided by this Court, and not the district court. *See Hanserd*, 123 F.3d at 934; *Sonshine*, 132 F.3d at 1134.

decision in *Bailey v. United States*, 516 U.S. 137 (1995), on December 6, 1995. *Bailey* held that the lower courts, including our own, had been sustaining convictions under § 924(c) for innocent behavior. On November 6, 1996, after the effective date of the AEDPA, Hanserd filed a motion with this court seeking leave to file a second or successive petition in the district court based upon the intervening *Bailey* decision. Specifically, Hanserd claimed that under *Bailey* he was serving time for conduct that was never a crime. *Hanserd*, 144 F.3d at 924.

Thus, the issue presented in *Hanserd* was "whether AEDPA's new restriction on filing multiple § 2255 motions 'is the type of provision that should govern cases arising before its enactment.'" *Id.* (quoting *Landgraf*, 511 U.S. at 280). Noting that Congress had not expressed any clear answer to the question, the *Hanserd* court looked to *Landgraf's* default rules to decide the issue. *Id.* This involved first determining whether the new legislation makes any changes to the controlling law, and second, whether, in light of any change, applying the relevant new law would attach new legal consequences to conduct predating the Act's passage such that applying it would have an impermissible retroactive effect. *Id.* at 924-25 (citing *Landgraf*).

The *Hanserd* court noted that under pre-AEDPA jurisprudence, a federal prisoner who wished to file a second or subsequent § 2255 motion was required to prove in the district court either that the motion did not constitute "abuse of the writ" or that he had made a "colorable showing of factual innocence," as required by *McCleskey*. *Id.* at 928. The court determined that Hanserd satisfied both of these criteria, because he could show both "cause" and "prejudice" for failing to raise the *Bailey* issue in the first motion. The court found that Hanserd had demonstrated cause for his failure to raise the issue in his first motion because at the

time, this Court had supported a broad definition of "use" under the statute and had specifically rejected the claim in his direct appeal. *Id.* at 929. Hanserd also made a sufficient showing of both prejudice and actual innocence, because "it appear[ed] from the record that he pleaded guilty and was convicted for conduct that is, under *Bailey*, not criminal." *Id.* The *Hanserd* court therefore concluded that "under the old abuse-of the-writ standard Hanserd would be entitled to raise his *Bailey* claim in a § 2255 motion." *Id.*

Next, the *Hanserd* court determined that the AEDPA standard would not allow such a § 2255 motion. The court noted that under the new law, a prisoner may file a second § 2255 motion only if the court of appeals rules that the motion contains newly discovered evidence or is based on a new rule of constitutional law. The *Hanserd* court observed that in the case *sub judice* there was no newly discovered evidence, and that *Bailey* merely decided the proper meaning of "use" under § 924(c) and did not announce a new rule of constitutional law. *Id.* at 929. Under the AEDPA standard, Hanserd's request to file the § 2255 motion would be denied. *Id.* Thus, applying the new statute would attach a severe new legal consequence to his filing a first motion; Hanserd would have lost the right to challenge his sentence. *Id.* at 931. The *Hanserd* court therefore held that Hanserd did not need permission to file a second motion to challenge his § 924(c) convictions under 28 U.S.C. § 2255 in the district court.

Relying on *Hanserd*, the movant in *Sonshine* argued that he should be allowed to file a second motion to vacate to raise ineffective assistance of trial and appellate counsel due to their failure to advise Sonshine or the district court that the court was required to impose his sentences on two counts concurrently with his undischarged prison term. Sonshine relied upon the following passage in *Hanserd*: "We therefore hold that a federal prisoner must satisfy the new requirements

of 28 U.S.C.§ 2255 only if he has filed a previous § 2255 motion on or after April 24, 1996, the date AEDPA was signed into law. As Hanserd's previous § 2255 motion was filed before that date, he does not need to meet this new standard to file a second motion." *See Sonshine*, 132 F.3d at 1134 (quoting *Hanserd*, 123 F.3d at 934). Sonshine claimed that this language in *Hanserd* meant that he did not need to meet the new gatekeeping requirements of AEDPA because, like Hanserd, his first § 2255 motion was filed before April 24, 1996. He therefore reasoned that he does not need this court's authorization to file a second § 2255 motion at this time.

The *Sonshine* court rejected this reading of *Hanserd*:

> Taken out of context in this way, the quoted portion of the *Hanserd* decision would seem at first glance to support Sonshine's position. *See also Hanserd*, 123 F.3d at 933 ("Our holding means that federal inmates will have one post-AEDPA bite at the apple, limited further, for prisoners who filed a § 2255 motion before AEDPA's enactment, by the old abuse-of-the-writ standard."). Sonshine is now requesting his "one-post AEDPA bite at the apple." However, when read in the context of the entire decision, it is clear that his case is not supported by *Hanserd*.
>
> The specific problem we addressed in *Hanserd* was whether a legitimate claim brought pursuant to *Bailey v. United States*, 516 U.S. 137, . . . (1995), could be brought before the federal courts when the movant had already presented a pre-AEDPA, pre-*Bailey* motion to vacate under § 2255, and would thus be barred from bringing another § 2255 motion by the gatekeeping requirements set up by Congress in AEDPA. While *Bailey* itself was merely a decision of

statutory interpretation--making it ineligible to support a second § 2255 motion under AEDPA--it raised concerns of constitutional dimension as numerous inmates were serving mandatory prison time for offense of which they were actually innocent. *See Triestman v. United States*, 124 F.3d 371-72, 379 (2d Cir. 1997); *Hanserd*, 123 F.3d at 929.

We, therefore, analyzed the effect that AEDPA had on a claim, such as that raised by Hanserd, which would have survived the old "abuse-of-the-writ" test, *see McCleskey v. Zant*, 499 U.S. 467, 494-95, . . . (1991), under the Supreme Court's decision in *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 . . . . We concluded that AEDPA does not apply to a movant seeking to raise a *Bailey* claim after having filed a pre-AEDPA motion to vacate because applying AEDPA would have a retroactive effect on the movant's pre-AEDPA conduct, i.e., he would be barred from filing a second motion to vacate under AEDPA whereas, before the Act, he would have been permitted to file his second motion.

Because the Hanserd court's Landgraf analysis was based upon the retroactive effect that AEDPA had on the movant's particular claim, the Hanserd holding must be similarly circumscribed. Consequently, while Hanserd is not strictly limited to claims arising under Bailey, apart from that class of claims, there will be few other cases "in which the difference matters," Hanserd, 123 F.3d at 934 n.21, and on which the gatekeeping requirements of AEDPA will thus have an impermissibly retroactive effect.

Id. at 1134-35 (emphasis added). The *Sonshine* court concluded Sonshine was not entitled to relief, because the

issue he sought to raise was basically one arising under the Sentencing Guidelines, which would be barred under both AEDPA and the abuse-of-the-writ standard. *Id.* The court further noted that Sonshine would not have prevailed under the pre-AEDPA law, because his petition would have been denied as an abuse of the writ. *Id.* Thus, the AEDPA's new restrictions did not attach new legal consequences for Sonshine, and the AEDPA had no "impermissibly retroactive effect" on the case. *Id.*

Thus, in *Sonshine*, this Court carefully limited *Hanserd*. The *Sonshine* court stated that the retroactivity determination in *Hanserd* was based on the particular facts presented, and while *Hanserd* is not strictly limited to claims arising under *Bailey*, "apart from that class of claims," few cases will qualify as those "in which the difference matters" and the AEDPA will have an impermissibly retroactive effect.

In *Green*, we refused to apply *Hanserd* where it was clear from the record that the prisoner could not have justified a second action under the pre-AEDPA cause and prejudice standard. The movant in *Green* had been convicted of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). Green filed his first motion to vacate under § 2255 on June 25, 1992, which was subsequently denied as without merit. He filed a second § 2255 motion on August 3, 1995, which the district court denied as an abuse of the writ. In his third motion, Green argued that there had been a substantive change in the law based on *Old Chief v. United States*, 519 U.S. 172 (1997). *Old Chief* held that a district court abused its discretion for admitting evidence of a prior conviction for the sole purpose of supporting a 18 U.S.C. § 922(g) conviction, after the defendant offered to stipulate to the existence of the prior conviction. *See Green*, 144 F.3d at 385. The *Green* court held that the decision in *Old Chief* announced a "new rule" of criminal procedure, and was

subject to the rule of *Teague v. Lane*, 489 U.S. 288 (1989) (holding that if a decision announces a "new rule" of criminal procedure, it is not to be applied retroactively to convictions that have already become final when the decision is announced, subject to certain exceptions). As such, it was not retroactive and was therefore inapplicable on collateral review. *Id.*

More importantly, the *Green* court held that regardless of whether *Old Chief* announced a new rule, the gatekeeping provisions of § 2244 applied to Green's case because Green would not have been able to establish cause to excuse his failure to assert this claim in his first pre-AEDPA § 2255 motion to vacate. The court reasoned: "If *Old Chief* was dictated by precedent, then his claim would not have been considered 'novel,' so as to establish cause his failure to assert this claim in his first motion to vacate." *Id.* at 387. The *Green* court concluded:

> Thus, even if *Old Chief* did not announce a new rule, applying AEDPA to this case would not have a retroactive effect on pre-AEDPA conduct. Green would have been barred from asserting this claim in a pre-AEDPA motion to vacate under the abuse of the writ doctrine, as he would not have been able to establish cause to excuse his failure to present this claim in his first motion to vacate, nor could he have otherwise made a colorable showing of factual innocence. *See McCleskey v. Zant*, 499 U.S. 467, 495 . . . (1991); *In re Hanserd*, 23 F.3d at 928-29.

Id. at 387-88. The gatekeeping provisions in § 2244 therefore applied to Green's case. *Id.* at 388.

The *Hanserd* exception, as clarified by *Sonshine* and *Green*, does not apply here. *Sonshine* makes clear that the AEDPA gatekeeping provisions of § 2244(b)(2) cannot be

avoided simply because the initial habeas petition was filed pre-AEDPA. Furthermore, it is apparent from *Hanserd*, *Sonshine*, and *Green* that the exception applies where the petitioner was *unable because of the then-current state of the law* to raise a claim in his first federal petition. In *Hanserd*, the movant's request was based on an intervening Supreme Court decision that gave the movant an argument that he could not have previously raised in his initial habeas petition. Thus, the movant in *Hanserd* had cause to excuse his abuse of the writ. He also obviously established prejudice, since the *Bailey* decision made it clear that Hanserd had been convicted for innocent behavior. The movants in *Sonshine* and *Green* could not establish cause because the new claims they sought to raise were not new or novel.

Unlike the prisoner in *Hanserd*, Byrd was on notice, certainly as early as his first federal habeas petition, that he could avail himself of the actual innocence/fundamental miscarriage of justice exception to excuse any procedural default. *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *accord Sawyer v. Whitley*, 505 U.S. 333, 339 (1992); *Dugger v. Adams*, 489 U.S. 401, 411 n.6 (1989); *Smith v. Murray*, 477 U.S. 527, 537-38 (1986); *Murray v. Carrier*, 477 U.S. 478, 495-96 (1986); *Engle v. Isaac*, 456 U.S. 107, 135 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 91 (1977); *see also McCleskey v. Zant*, 499 U.S. 467, 494 (1991). Furthermore, Byrd also had to have known that actual innocence/miscarriage of justice" exception extends to abuse of the writ. *See Herrera v. Collins*, 506 U.S. 390, 404 (1993) ("In a series of cases culminating with *Sawyer v. Whitley*, 505 U.S. 333 . . . (1992), decided last Term, we have held that a petitioner otherwise subject to defenses of abusive or successive use of the writ may have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence. This rule, or fundamental miscarriage of justice exception, is grounded in the "equitable discretion" of

habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons."); *Sawyer*, 505 U.S. 333, 339-40 (1992) ("We have previously held that even if a state prisoner cannot meet the cause and prejudice standard, a federal court may hear the merits of the successive claims if the failure to hear the claims would constitute a "miscarriage of justice." In a trio of 1986 decisions [*Kuhlmann v. Wilson*, 477 U.S. 436 (1986), *Murray v. Carrier*, 477 U.S. 478 (1986); and *Smith v. Murray*, 477 U.S. 527, 537 (1986)] we elaborated on the miscarriage of justice, or "actual innocence," exception. As we explained in *Kuhlmann*, the exception developed from the language of the federal habeas statute, which prior to 1966, allowed successive claims to be denied without a hearing if the judge were "satisfied that the ends of justice will not be served by such inquiry.")

In short, Byrd was on notice, as early as the filing of his first federal habeas petition in 1994, that his actual innocence claim, which he had admittedly known about since 1989, could have been raised and would have excused the procedural default of failing to raise it in the state courts. Instead, Byrd's actual innocence claim lay dormant through the filing and appeal of his first federal habeas petition and denial of certiorari, not to mention both the state appellate process and postconviction proceedings[6], and was not

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[6] Byrd also could have brought a successive postconviction petition in the Ohio courts. *See* Ohio Rev. Code § 2953.23(A) [pre-1995 version of the statute] (providing that "the court may, in its discretion and for good cause shown, entertain a second petition or successive petition for similar relief on behalf of the petitioner based upon the same facts *or newly discovered evidence*. (Emphasis added.) Furthermore, under the prior version of the statute, a postconviction petition could be filed "at any time." Ohio Rev. Code §

resurrected until January 2001, nearly twelve years later after Byrd admittedly became aware of it. Thus, unlike the movant in *Hanserd*, Byrd *could have* raised his actual innocence claim in his first, pre-AEDPA federal habeas petition. *And Byrd actually knew this.* In an "Application for Stay of Proceedings to Allow Investigation and Discovery of Potential Claims and For Leave to Amend Petition to Comply With McClesky v. Zant, 113 S. Ct. 1454 (1991)," filed on March 7, 1994, he stated:

> What [*McCleskey*] means to Petitioner Byrd is clear. He will have one chance to bring his habeas claims before the federal court. He and his counsel have the obligation to pursue all potential constitutional claims for which "reasonable investigation" may reveal previously unknown factual support.

2953.21. *See also State v. Byrd*, No. C-010379, - N.E.2d - , 2001 WL 950185 (Ohio Ct. App. Aug. 21, 2001) (per curiam).

As the Ohio Court of Appeals noted in its denial of Byrd's appeal of the state trial court's denial of his successive postconviction petition,

> [Byrd's] attorneys acknowledge that, since 1989, they have been in possession of an affidavit from co-defendant John Brewer stating that he, and not Byrd, fatally stabbed Tewksbury. Thus, Byrd cannot show that he was "unavoidably" prevented from presenting in a postconviction petition his claim of "actual innocence."

Byrd, 2001 WL 950185, at *4 .

For this reason, *Hanserd* and progeny are inapplicable. Furthermore, for the reasons we address next, pre-AEDPA law would not have entitled Byrd to raise the new habeas claims in any event. Thus, the application of pre-AEDPA law would not be "a difference that matters" entitling Byrd to pre-AEDPA standards under a *Landgraf* analysis.

III.

A.

Even if pre-AEDPA law applied to Byrd's case, Byrd's claim fails. First, and foremost, Byrd's case is the quintessential abuse of the writ -- as Byrd readily concedes, he deliberately withheld his actual innocence claim from his first federal habeas petition.

> Thus, for example, if a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, in the hope of being granted two hearings rather than one or for some other such reason, he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground. . . . Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless, piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay.

Sanders v. United States, 373 U.S. 1, 18 (1963) (construing 1948 version of §2244; holding that new-claim successive petitions were barred "only if there had been some abuse of the writ," which the Court described as above). *See also United States v. MacDonald*, 966 F.2d 854, 860 (4th Cir. 1992) (holding that defense counsel's strategic decision to withhold certain evidence did not amount to cause; stating that "[s]uch deliberate by-pass clearly cannot survive abuse

of the writ analysis on a second habeas appeal"; citing *McCleskey*); *Gunn v. Newsome*, 881 F.2d 949, 957 (11th Cir. 1989) ("If the petitioner knowingly and deliberately withheld the claim from a prior petition, then he has abused the writ."). Furthermore, as the Supreme Court's discussion in *McCleskey* of the history of the abuse of the writ doctrine makes clear, Byrd's deliberate abandonment of his actual innocence claim, although not the only example of conduct that disentitled a petitioner to relief, is the classic one. *See McCleskey*, 499 U.S. at 479-90 (discussing the origins and meaning of the abuse of the writ doctrine).

Byrd acknowledges that he had in his possession since 1989 the affidavit of co-defendant Brewer, which he could have used in support of his earlier claim that Armstead's testimony was perjured. He has sat on this evidence, like a chicken waiting for an egg to hatch, for twelve years, despite repeated contact with both the state and federal courts. There is simply no legal excuse for this conduct.

What makes Byrd's abuse of the writ even more outrageous is the fact this Court actually gave him the opportunity - indeed directive - to raise his actual innocence claim. When we granted a stay of execution following the district court's initial denial in 1994 of Byrd's first habeas petition

> [a]mong other things, our order granted Petitioner "120 days to allow for further investigation and discovery of possible habeas claims," *id.* at 1187-88 [*Collins v. Byrd*, 510 U.S. 1185 (1994) (Scalia, J., dissenting from denial of the application to vacate stay of execution)] . . . as well as "leave . . . to amend the petition within sixty (60) days of this order *to include any newly discovered claims*[.] *Id.* at 1187-88[.]

Byrd, 209 F.3d at 499 (emphasis added).[7] Byrd sat on this evidence despite the explicit opportunity and express instruction to raise "any newly discovered claims." In light of this prior order, Byrd's deliberate silence then, and brazen attempt now to assert the claim, is nothing short of fraud on this Court.

In short, Byrd utterly fails to establish cause to excuse his abuse of the writ. Thus, Byrd cannot prevail, even under the pre-AEDPA cause and prejudice test excusing an abuse of the writ.

B.

Even where the petitioner is unable to show cause and prejudice to excuse the abuse of the writ, he may yet be able to excuse the abuse and proceed with a second habeas petition.

> Federal courts retain the authority to issue the writ of habeas corpus in a further, narrow class of cases despite a petitioner's failure to show cause for a procedural default. These are extraordinary instances

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[7] Byrd filed his federal habeas petition on March 7, 1994, only eight days before his scheduled execution. Byrd filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The district court rejected Byrd's habeas petition on grounds of inexcusable delay. We granted a stay of execution, however. The State filed an application to vacate the stay of execution in the United States Supreme Court, which was denied by Justice Stevens, over Justice Scalia's dissent. Our order stayed Byrd's execution for "120 days to allow for further investigation and discovery of possible habeas claims." *See Collins v. Byrd*, 510 U.S. 1185 (1994) (Scalia, J., dissenting); *see also Byrd v. Collins*, 209 F.3d 486, 499 (6th Cir. 2000), *cert. denied*, 531 U.S. 1082 (2001).

> when a constitutional violation probably has caused the conviction of one innocent of the crime. We have described this class of cases as implicating a fundamental miscarriage of justice. *Murray v. Carrier*, *supra*, 477 U.S. at 485, 106 S. Ct., at 2643.

McCleskey, 499 U.S. at 494; *see also Schlup*, 513 U.S. at 314-15 (quoting *McCleskey*). Again, Byrd is not exempted from the AEDPA's standards because the outcome of this case does not differ under this exception either.

Initially, we note that Byrd invokes the wrong actual innocence standard. Contrary to his assertion, the *Schlup* standard does not apply. In *Schlup*, the Supreme Court held that for a procedural claim of innocence (as opposed to a substantive constitutional claim of innocence as in *Herrera v. Collins*, 506 U.S. 390 (1993), to meet the miscarriage of justice exception to excuse abuse of the writ, the habeas petitioner "must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Schlup*, 513 U.S. at 327.[8] However, the

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[8] Byrd indicates that he seeks to raise in his second or successive petition, the following claims:

> 1) A *Massiah* claim involving the state's use of informant Virgil Jordan to elicit statements from Byrd in violation of his Sixth Amendment right to counsel; 2) A claim that prosecutors presented testimony they knew was false when they had two witnesses identify a knife as the weapon used in the U-Totem robbery even after the crime lab concluded that the knife was not the one used in that robbery; 3) A claim that trial counsel were ineffective for failing to investigate and

Schlup standard applies to claims of actual innocence of the underlying conviction. *Id.* at 325. Byrd is not challenging his underlying conviction, but only his sentence. *See* Byrd's Memorandum in Support, at 1-2, 46 n.20. Thus, the appropriate standard of review here is the "clear and convincing standard found in *Sawyer*, "which was fashioned to reflect the relative importance of a claim of an erroneous sentence." *Id.*

> present testimony from available Workhouse inmates who could have revealed the scheme concocted by Ronald Armstead and Virgil Jordan to give false testimony against Byrd and his co-defendants; and 4) A substantive claim of actual innocence of the death penalty under *Herrera v. Collins*, 506 U.S. 390 (1993).

Byrd's Memorandum in Support at 46 n.20. On the surface it appears that Byrd is attempting to use his actual innocence claim as a "gateway through which a habeas petition must pass to have his otherwise barred constitutional claim considered on the merits." *Schlup*, 513 U.S. at 315. In actuality, he is trying to use his actual innocence claim procedurally as the way to raise barred constitutional claims *and an also-barred substantive actual innocence claim.*

Furthermore, Byrd's claim that he could not have raised his actual innocence claim in the state court because Ohio did not at the time recognize actual innocence of the death penalty as a cognizable claim must be rejected, because he most certainly could have used it in support of his due process challenge to the sufficiency of the evidence. *See State v. Campbell*, 1997 WL 5182, at *3, No. C-950746 (Ohio Ct. App. Jan. 8, 1997) (per curiam).

In *Sawyer*, the Supreme Court held that in order for a court to reach the merits of a petitioner's successive claim that he is "actually innocent" of the death penalty, the petitioner "must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law." *Sawyer*, 505 U.S. at 336. Byrd cannot meet this standard.

Byrd's only evidence is the first Brewer affidavit. It was made in 1989, six years after he had been convicted and sentenced for his part in the Tewksbury robbery and murder. *See State v. Brewer*, No. C-830672, 1984 WL 6695 (Ohio Ct. App. July 18, 1984) (affirming Brewer's conviction on direct appeal). Thus, Brewer's confession was made only after he was no longer subject to further punishment for his actions in that robbery and murder. By waiting to provide the statement until 1989, Brewer could arguably shield both himself and Byrd from the death penalty because of double jeopardy. Such tactical maneuvers render the affidavit highly suspect.

Furthermore, Brewer's affidavit contradicts his own trial testimony. In August 1983, Brewer testified at his own trial. He stated that he did not participate in the killing of Monte Tewksbury and was not at the King Kwik. Brewer Tr. 874, 877. Not long after his trial, while awaiting placement in a state penal institution, Brewer told a prison social worker and a psychology assistant on August 18, and August 23, 1983, that Byrd killed Tewskbury. In September 1983, he also wrote letters to the parole authority stating that he did not want to be sent to the Lucasville prison, where Byrd and Woodall were, and reiterating that he knew nothing about the killing. (J.A. 211.)

Byrd acknowledges these facts in his Memorandum in Support, but nonetheless attempts to explain the inconsistency with his affidavits as "understandable" because

"[t]wenty year old defendants who go on trial are not eager to be convicted of serious crimes with long sentences." Byrd's Memorandum in Support at 39. Byrd further attempts to minimize the absolute contradictions by proclaiming that "Brewer readily admits in his 2001 affidavit that his trial testimony was not truthful." *Id.* The question for this Court then is: "Was Brewer lying in 1983, was Brewer lying in 1989, or is he lying now?" This is certainly not the kind of "clear and convincing evidence" that would prevent any reasonable juror from finding Byrd eligible for the death penalty.

There is also the dying declaration of the third co-defendant, William Woodall. Woodall was diagnosed late last year with terminal cancer. On January 29, 2001, he was rushed to the local hospital because he was suffering from "chest pains, possible heart attack." (J.A. 187.) Two prosecutors and a state highway patrolman went to see him. In signed affidavits recounting their interview, they claim that Woodall blamed Byrd for Tewksbury murder. Howard H. Hudson III, a staff lieutenant assigned to the Office of Investigative Services with the Ohio State Highway Patrol, stated in his affidavit that:

> 4.) Mr. Woodall expressed extreme remorse over the death of Monte Tewksbury, stated that he was dying from lung cancer and had been told he has no more than a year to live, and that he had made his peace with God.
>
> 5.) Mr. Woodall said that year ago while he was confined at the Southern Ohio Correctional Facility in Lucasville, Ohio, he signed affidavits for the Ohio Public Defender which were not true. He signed these at the request of inmate Johnny Brewer to help inmate John Byrd, Jr. Recently he has been asked on numerous occasions to meet with the Ohio Public

Defender's representing John Byrd, Jr., but that he has refused to do so.

6.) Mr. Woodall said that Johnny Brewer never told him that he had killed Monte Tewksbury. Mr. Woodall was shown the statement in Johnny Brewer's affidavit numbered (11) wherein he stated "When I got back in the van I said to Danny Woodall, 'Man I stabbed a guy, take off.'" Mr. Woodall said that did not happen.

7.) Mr. Woodall stated that when John Byrd, Jr. and Johnny Brewer returned to the van after coming out of King Kwik, that John Byrd, Jr. had the knife.

8.) Mr. Woodall stated that while confined at the A Block of the Cincinnati Workhouse awaiting trial in 1983, John Byrd, Jr. told black inmates who were harassing him not to mess with him because he had already killed a man and wasn't afraid to kill again.

9.) Mr. Woodall said the owner of the van used during the murder of Monte Tewskbury, Leroy Tunstall, visited him in jail shortly after the crimes. Mr. Woodall told Leroy Tunstall that John Byrd, Jr. was the one who murdered Monte Tewksbury.

(J.A. 190-91.) Furthermore, Mark E. Piepmeier, an assistant Hamilton County Prosecutor, attested that:

2.) I visited Mr. Woodall at the London Correctional Facility on January 29, 2001, along with assistant Hamilton County Prosecutor William E. Breyer and St. Lt. Howard Hudson of the Ohio State Highway Patrol. . . .

3.) I was present when Mr. Woodall made the statements contained in the affidavit of Howard Hudson.

4.) I made a follow up visit to Mr. Woodall at the Ohio State University Hospital on Wednesday, January 31, 2001 along with assistant Hamilton County Prosecutor William E. Breyer.

5.) Mr. Breyer and I spoke to Mr. Woodall in a hospital room at the Ohio State University Hospital on January 31, 2001. Mr. Woodall said his medical condition had worsened and he realized he did not have long to live.

6.) Mr. Woodall confirmed that everything he had told myself, Mr. Breyer, and Howard Hudson on January 29, 2001 was true.

7.) Mr. Woodall said that Johnny Brewer had written to him several times and told him that he was going to lie on behalf of Mr. Byrd, and encouraged Mr. Woodall to do the same.

(J.A. 188-89.) Woodall died on April 8, 2001.

Woodall also implicated Byrd in August 1983, less than a month after his trial, when he told a prison social worker that he only drove the van and that Byrd said he stabbed the store clerk. In two letters written on August 29, 1983 and September 9, 1983, Woodall asked that he not be sent to Lucasville because Byrd was there and Byrd was mad at him. Woodall also indicted that Byrd was untruthfully blaming Brewer for the stabbing. (J.A. 192-95.)

Like Brewer's various statements over the years, Woodall's statements are contradictory. According to former inmate Dan Cahill, Woodall told him (while both were

working as Ohio Prison Industries clerks) that Byrd did not stab Tewksbury and that the wrong man was on death row. (J.A. 118.) In 1993, Woodall signed an affidavit for the Ohio Public Defender's office in which he stated that Brewer, not Byrd, carried the knife at all times, and that when he left the King Kwik store, the knife Brewer was still carrying was covered with blood. (J.A. 196-97.)

Ironically, Byrd states in his Memorandum that he did not submit Woodall's affidavit in the state postconviction petition "because of concerns about his reliability." Byrd's Memorandum in Support, at 37. Brewer's varying statements share the same consistently inconsistent stories, and we share Byrd's "concerns about [Brewer's] reliability." In short, the evidence before us is hopelessly contradictory -- both internally and as between the two co-defendants. This is simply not clear and convincing evidence that would allow us to conclude that no reasonable juror would have found Byrd eligible for the death penalty. Byrd's evidence does not satisfy the *Sawyer* standard.

IV.

Byrd asks us in the alternative to remand his case to the district court for an evidentiary hearing. However, the Ohio state courts have already rejected his new evidence of actual innocence, finding that it lacked any credibility. This factual finding is entitled to a presumption of correctness in later federal habeas corpus cases. *Patton v. Yount*, 467 U.S. 1025, 1038 (1984); *see also Ellis v. Collins*, 956 F.2d 76, 79 (5th Cir.) (holding that a state trial court's summary determination that affidavits lacked credibility was entitled to a presumption of correctness in federal habeas corpus proceedings), *cert. denied*, 503 U.S. 915 (1992). For the reasons articulated above, we find absolutely no basis to disturb that finding.

'Byrd's request for an evidentiary hearing must also be rejected because he failed to diligently develop facts in support of his claim, and cannot show cause and prejudice. *See Williams v. Taylor*, 529 U.S. 420, 433-34 (2000) (noting that 28 U.S.C. § 2254's limitation on evidentiary hearings codifies and strengthens pre-AEDPA due diligence requirement established by *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992)). And in all events, Byrd had a previous opportunity to explore his actual innocence - in his first federal habeas petition. Byrd's request is rejected.

V.

Byrd's renewed attacks on trial witness Armstead's credibility, to the extent they are not barred under 28 U.S.C. § 2244(b)(1), do not provide proof of "actual innocence" sufficient to excuse an abuse of the writ. *Cf. Clark v. Lewis*, 1 F.3d 814, 824 (9th Cir. 1993) (allegation that prosecution witness could have been impeached by allegedly withheld evidence did not constitute a credible claim of "actual innocence" sufficient to show that the petitioner was actually innocent of the death penalty).

VI.

For all the foregoing reasons, Byrd's request for an exemption from § 2244(b) of the AEDPA is **DENIED, AND A TEMPORARY STAY OF EXECUTION IS GRANTED UNTIL SEPTEMBER 18, 2001.** Further, because Byrd has cited no new rule of constitutional law, or provided any newly discovered evidence, the AEDPA bars the filing of any second or successive petition. Thus, Byrd's motion for stay of execution is **DENIED.**

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Clerk

CONCURRING IN PART, DISSENTING IN PART

ALICE M. BATCHELDER, Circuit Judge, concurring in part and dissenting in part. I concur in the result reached in Judge Suhrheinrich's opinion and in the reasoning therein. I specifically dissent from the granting of a stay of execution and a continuance.

Understanding the procedural posture of this matter is critical to an understanding of why there is no legal basis upon which a stay of execution and a continuation of this matter may be granted. Byrd concedes that the initial determination of whether the AEDPA applies to this case must be made by this court, and not the district court. The vehicle for obtaining that determination is a motion under 28 U.S.C. 2244(b)(3) for an order authorizing the filing of a successive petition. Had Byrd simply filed his petition in the district court, that court would have been required under our precedent to transfer the matter here for our determination of whether to authorize the filing. *See In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997). In short, all roads lead to the requirement that Byrd specifically move for authority to file a successive petition.

Having been constrained to treat Byrd's motion as a motion under 28 U.S.C. § 2244(b)(3)(A), a majority of this panel has concluded that the motion must be denied because the AEDPA does apply to Byrd's attempt to obtain habeas relief, and that Byrd cannot satisfy the requirements imposed by the AEDPA on the filing of a successive habeas petition. *See* 28 U.S.C. § 2244 (b)(2) and (C). And that conclusion is neither appealable nor is it permitted to be the subject of a petition for rehearing or a petition for certiorari. *See* 28 U.S.C. § 2244(E).

Because the conclusions of the majority of this panel are final and not appealable, there is simply no basis for granting a stay of execution or a continuance.

DISSENT

NATHANIEL R. JONES, Circuit Judge, dissenting. I am convinced beyond doubt, that this court must carefully explore whether Byrd can satisfy the legal standard that would entitle him to file a second habeas petition. The complexity of the issues raised by the petitioner are of such scope and magnitude as to demand a careful and exhaustive analysis. I believe that the petition squarely implicates a question of fundamental fairness. Thus, a stay of execution is imperative. Byrd should not be put to death before this court is able to give full consideration to the issues raised in his case. *Steffen v. Tate*, 39 F.3d 622, 625 (6th Cir. 1994).

I dissent.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 01-3927

In re: JOHN W. BYRD, JR.,
Movant.

Filed: September 10, 2001

I request that the en banc court determine whether to vacate the 8-day stay of execution granted by a majority of the panel that considered Byrd's ambiguous motion, which the panel treated as a motion to file a second or successive habeas petition, and denied.

I can understand how a panel, faced with a last-minute motion, and out of an abundance of caution, could stay an execution while it is considering the motion. I can understand why a member of the panel, for tactical or other reasons, could request that the panel defer a ruling and issue a stay.

However, I cannot understand how a panel can render a decision on the merits, which affirmatively finds that the prisoner's claims and tactics have no merit, and then issue a stay to allow one member of the panel "additional time to consider the matter." We are not a "super-court" that supervises all executions in the states within our jurisdiction. Our jurisdiction is limited by Constitution and statute. The

panel has determined all matters that come within that jurisdiction.

In my opinion, it is therefore simply lawless to stay an execution as a matter of comity to one member of the panel, when there is no jurisdictional basis for doing so.

/s/ Danny J. Boggs

Danny J. Boggs
Circuit Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 01-3927

In re: JOHN W. BYRD, JR.,
Movant.

Filed: September 11, 2001

ORDER

A member of the court has requested that the en banc court determine whether to vacate the stay of execution included in its September 10, 2001 decision on the movant's request for a determination that 28 U.S.C. §2244(b) does not apply to him, and his request for a stay of execution while he pursues a second federal habeas petition.

The request for an en banc determination has been referred to all of the active judges of the court, less than a majority of whom have voted in favor of vacating the stay. A majority of the active judges have voted to extend the stay of execution until October 8, 2001; in addition, the clerk of the court is directed to file and submit to the court any petition offered by a party seeking en banc review of the decision of the panel.

IT IS SO ORDERED.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Leonard Green, Clerk

DISSENT

[Filed: September 12, 2001]

BOGGS, Circuit Judge, dissenting from the refusal to vacate the panel's stay and dissenting from the order extending the stay.

The panel's order of September 11, 2001, Order Denying John Byrd's Motion to Determine whether 28 U.S.C. § 2244(b) of the AEDPA Applies to his Case, addresses Byrd's self-titled "Motion [to] Determine Whether 28 U.S.C. § 2244(b) of the AEDPA applies to His Case." However, procedurally Byrd's motion can only be one thing if it is to be properly before this court: an application pursuant to 28 U.S.C. § 2244(b)(3)(A), seeking permission of the court of appeals to file a second habeas petition. The panel dealt with Byrd's motion as such, *see id. at n.1*, and rendered a decision on the merits, first holding that § 2244(b) does apply to Byrd and then denying his request to file a second habeas petition. An order such as this, denying permission to file a second habeas petition, is not reviewable en banc. *See In re King*, 190 F.3d 479, 480-81 (6th Cir. 1999).

Alternatively, the panel may have found Byrd exempt from AEDPA. However, in that case, this court would have no jurisdiction over his petition, as a habeas petition must be filed first in district court. Had Byrd gone to district court, it is conceivable that action by the district court could be reviewed on appeal or en banc. However, our court cannot take jurisdiction over a non-AEDPA habeas petition in the first instance.

I can understand how a panel, faced with a last-minute motion, and out of an abundance of caution, could stay an execution while it is considering the motion. I can understand why a member of the panel, for tactical or other reasons, could request that the panel defer a ruling and issue a stay.

However, I cannot understand how a panel can render a decision on the merits, which affirmatively finds that the prisoner's claims have no merit, and then issue a stay to allow one member of the panel "additional time to consider the matter." We are not a "super-court" that supervises all executions in the states within our jurisdiction. Our jurisdiction is limited by Constitution and statute. The panel has determined all matters that come within that jurisdiction.

This court's power to issue a stay was therefore dubious at best (a fact that the panel apparently later recognized, since it removed all reference to the stay from its amended decision. *Compare* September 10, 2001, Order Denying John Byrd's Motion to Determine whether 28 U.S.C. § 2244(b) of the AEDPA Applies to his Case, and Granting a Temporary Stay of Execution until September 18, 2001, *with* September 11, 2001, Order Denying John Byrd's Motion to Determine whether 28 U.S.C. § 2244(b) of the AEDPA Applies to his Case). Then, however, the situation was exacerbated when the clerk of this court issued a much longer stay, apparently based on the word of one Article III judge that a majority of the active members of the court had approved it. This act was

taken in response to no apparent motion, it had no jurisdictional basis, and it was done *without providing any notice to some members of the court.*

What we hold, apparently, is that death-sentenced prisoners need not resort to creative legal tactics to come within this court's jurisdiction. So prisoners may file anything, regardless of statute or prior law, and the en banc court may stay their execution for any length of time it chooses. For example, they could file a hot dog menu, and the en banc court might use that as a legal basis to stay their execution.

The truth may be that for *this* prisoner, a majority of the active members of *this* court would grant a stay based on a hot dog menu. This, however, is not a correct statement of the law (nor is it of any sort of law at all).

Under these circumstances:

> either the Supreme Court must reverse, at a minimum, the *extended* stay;
>
> this court must adopt new court rules explicitly allowing this type of currently lawless action; or

we must recognize and confess that a majority of the court simply feels that it is not bound by law when it comes to some death-sentenced prisoners.

CONCURRENCE

[As Amended and Filed on September 19, 2001]

NATHANIEL R. JONES, Circuit Judge, concurring with the order granting the stay of execution to October 8, 2001, in which COLE, Circuit Judge, joins.

With the United States Supreme Court's September 12th (6-3) denial of the State of Ohio's application to lift the stay of execution entered by a majority of the active judges of this court on September 11, and the dissatisfaction the non-prevailing judges have expressed with the procedures of this court in this matter, I feel compelled to write in support of the order of a majority of the en banc court extending the stay of execution. In so doing, it is necessary to refute the gross mischaracterization and factual misstatements contained in the dissents filed in this case.

On Tuesday September 11, a majority of the active judges did the following two things with respect to this case: (1) declined to lift an eight-day stay of execution set out in the Order drafted by Judge Suhrheinrich, and (2) decided to grant a stay of execution until October 8, 2001.

How this took place is very simple. The three-judge panel consisting of Judges Suhrheinrich, Batchelder, and myself, split, 2 to 1, over the issue of Byrd's entitlement to file a second petition and his request for stay of execution. On Saturday, September 8, I requested that Judge Suhrheinrich join in granting a thirty-day stay of execution. He tentatively agreed to do so. However, on September 10, during a panel conference call, he proposed a stay of only eight days. Judge

Batchelder objected in the strongest of terms and threatened to dissent. And she did dissent. I told Judge Suhrheinrich that I was withholding judgment until receipt of his Order. Upon reviewing the panel majority's twenty-five page Order and its injudicious language, I advised Judge Suhrheinrich, its author, orally and in writing, with a copy to Judge Batchelder, that in the interests of justice and fundamental fairness regarding this most final and irreversible of punishments, I was compelled to seek the longer stay.

I then spoke with Chief Judge Martin and a majority of the active judges. I expressed to each my views and urged them to consider my dissent to the panel majority's proposed order refusing realistic relief for the Petitioner, who faced death within thirty-six hours. Discussions between judges of this court are nothing new, especially in emergency situations such as the one involved here. Mr. Byrd was scheduled for execution at 10:00 a.m. September 12. Judge Suhrheinrich's proposed Order was received in chambers at 1:01 p.m. on the afternoon of September 10. However, before I had formalized a stay motion, on September 10, Judge Boggs, a non-panel member, interceded by filing an objection to the eight-day stay proposed by Judge Suhrheinrich and sought to have the en banc court vacate the stay. Judge Boggs also requested a polling of the active judges be taken by the Clerk of Courts regarding the stay.

The en banc court was thus activated by Judge Boggs's request. "Only Sixth Circuit judges in regular active service may cast votes on" an en banc poll. Sixth Circuit Internal Operating Procedure 35(a). In response to Judge Boggs's intervention seeking to vacate the eight-day stay, when polled, less than a majority of the en banc court favored his application. Instead, in individual communication with the Chief Judge and/or the Clerk of Courts, a majority favored extending the stay to October 8, 2001; pursuant to a directive

to the Clerk of Courts by the Chief Judge, an Order to this effect was filed on September 11. The exigencies of the circumstances required the prompt entry of the Order to preserve the status quo.

There was nothing secretive or mysterious about the procedure. Judge Suhrheinrich states in his dissent that "[T]here was no discussion as to the views and opinions of the minority of the Court members." These views were quite well-known by virtue of the panel Opinion and the filing of the objection. There seldom is a joint discussion when the polling occurs. It is not a collaborative process nor is a plenary session required. Judges are polled in a variety of ways for they are often in locations remote from the seat of the court. On numerous occasions this court, faced with urgent deadlines in death penalty and other cases, has needed to make contact by telephone and the other expeditious methods of communication in order to ascertain the will of individual judges.

Moreover, the significance of the fact that this process took place in the midst of the catastrophic events of September 11 should not be lost on my colleagues. On that day, the Chief Judge was away from his home chambers in Washington D.C., attending sessions of the Judicial Conference of the United States. Everything in our nation's Capital was disrupted that day, necessitating even an evacuation of the Judicial Conference. Notwithstanding the difficulties of the moment, the Chief Judge was able to use the means available to him to conduct the affairs of this court and did so appropriately.

An action is taken in the name of the en banc court when a majority of the judges in "regular active service" votes a particular way on a particular issue. The method of ascertaining views is not prescribed. When a majority of the active judges registered their preference - by whatever means

- the requirement was met. It should be noted that none of the en banc majority has questioned the procedures that led to the filing of the stay order.

At approximately the same time, the State of Ohio presented an application to United States Supreme Court Justice Stevens, as Circuit Justice, seeking to have the Supreme Court vacate the enlarged en banc stay. Upon referral to the entire Supreme Court, the application was denied, with three justices in dissent.

A majority of the active judges of this court felt that, in this emergency situation, a reasonable extension to October 8th was in order. Six justices of the United States Supreme Court voted not to disturb that decision. This court clearly acted appropriately in this matter, assertions to the contrary notwithstanding.

DISSENT

[Filed: September 19, 2001]

BOGGS, Circuit Judge, dissenting, in which SUHRHEINRICH and BATCHELDER, JJ., join. I add to my previous dissent, because any false impressions that a reader might take from other opinions on the public record should not stand uncorrected.

A voting ballot was issued to the nine active members of the court on Monday on my request to vacate the stay originally granted by the panel. That ballot said that votes could be cast at any time up until 2 P.M., Tuesday, September 11. At that point Byrd's execution was firmly stayed until September 18.

So far, so good, at least procedurally.

Monday night,[1] with the time for voting not having run, with only one formal vote (no) having been received in the Clerk's office (and 2 additional no notes and 3 yes votes still

[1] I emphasize in the strongest terms that the issuance of the court's order had NOTHING to do with the tragic events of Tuesday morning. The order to file the opinion had been given Monday night. Whatever judges supported that order at that time could not have, in the words of Judge Jones, "felt, in this emergency situation, a reasonable extension to October 8th was in order." Nor could they have believed, in his words, that "Petitioner faced death within thirty-six hours" since a stay was in place for more than a week from that time.

to be received Tuesday morning), the Clerk was informed verbally, by an Article III Judge, purporting to speak for the Chief Judge, that he should enter an order *immediately* the next morning, without any prior notice to the rest of the court, that would:

> 1) Deny the motion to vacate the stay, on which the time for voting had not expired, and on which no majority of negative votes had been received. [This was procedurally virtually criminal, as the only notice to the court indicated that each judge would have until 2 P.M. to vote (and, by practice, to change his or her vote, within the stated time)];
>
> 2) Enter an order extending the stay for 30 days, based on an alleged agreement from unnamed judges to a proposition without stated procedural basis, which had never, before or after, been reduced to writing, nor had or have its supporters yet been identified nor reduced to writing, nor had the proposition or its support been made available to many (perhaps all) members of the court; and
>
> 3) Enter an order directing prospectively the filing and circulating of an as-yet unreceived document purporting to be an en banc petition, in a circumstance where it is extremely dubious that such a petition is permissible. In fact, unanimous direct precedent of this court *en banc*, (see *In re King*, 190 F.3d 479 (6th Cir. 1999) (en banc)), and statutory authority, are specific that the petition would be an impermissible attempt to obtain en banc

> consideration of a matter that is not within the jurisdiction of the en banc court.

Again, this order was to be entered on the word of an Article III judge, purporting to speak for the Chief Judge, with the support of unnamed judges, whose support has never yet been memorialized in writing, upon a proposition never put before the other members of the court or reduced to writing.

Members of the court may indeed act in an informal manner in recording their opinions upon stated matters, in situations of extreme time pressure. There was no such pressure, and there was no stated matter. It is simply a lie to say that "the exigencies of the circumstances required the prompt entry of the Order to preserve the status quo." The status quo was preserved until September 18. It is also inaccurate to infer from the words "[i]nstead . . . a majority favored extending the stay" that each of those majority members acted subsequent to the request for a vote on vacating the stay. I am reliably informed that one or more judges whose approval was represented for the longer stay gave such approval before there had been either any action by the panel or the request for a vote on vacating the stay.

Finally, my information is that the "Clerk of Courts" had received NO communication from individual active members of the court as to the longer stay. What "individual communication with the Chief Judge" may have occurred is a matter which the Chief Judge has yet to communicate to me, the court generally, or to the Clerk.

This type of secret undocumented decision-making by exclusive in-groups is the way decisions are made in totalitarian countries, not usually in the United States. It is necessary, though highly painful, for me to place on the public record the way in which this purported order was

issued, and to dissent from that process, far beyond my dissent from the underlying and fundamental lack of legal support for the order.

CONCURRENCE

[Filed: September 19, 2001]

NATHANIEL R. JONES, Circuit Judge concurring in Order extending the Stay of Execution to October 8, 2001.

In light of Judge Boggs' amendment to his previous dissent, I must add two rebuttals to assertions it contains. First, its challenge on the basis of "It is simply a lie", the statement that "the exigencies of the circumstances required the prompt entry of the Order to preserve the status quo", ignores the fact that the attempt by Judge Suhrheinrich to grant a stay until September 18 had failed. Neither Judge Batchelder nor I concurred in that part of the Order. That meant that the execution date of September 12 remained in effect. I deemed that to be an "exigent circumstance."

The second rebuttal is note that the Clerk of Court was under a continuing directive from the Chief Judge to enter a stay Order he had previously prepared, at the appropriate time. The Clerk of Courts was fully cognizant of the Chief Judge's desires with respect to that Order. When the Chief Judge was advised that a majority of the active judges (confirmed by the Clerk) had expressed a desire to join in the thirty day stay the Chief Judge had previously directed be entered at the appropriate time, the Clerk was advised to enter the Stay Order as modified to reflect the support of the en banc majority. He was to do so "at the direction of the Chief Judge."

Finally, the concurrence's reference to the tragic events of September 11 and their disruptive effects on proceedings of the Judicial Conference in Washington and access to Judge Martin there, was meant only to note the obvious. He sought to perform his administrative and judicial duties on and after September 11, away from his Chambers, under the severe handicap created by that tragedy.

This case has stirred a disturbing degree of acrimony within the court which reflects the politicization of the issues by some public officials with motives open to serious question. It creates a climate that Judge Cranch warned about in one of the most eloquent dissents ever written nearly two hundred years ago:

> In times like these, when the public mind is agitated. . . . .it is the duty of a court to be peculiarly watchful lest the public feeling should reach the seat of justice, and thereby precedents be established which may become the ready tools of faction in times more disastrous. The worst of precedents may be established from the best of motives. We ought to be on our guard lest our zeal for public interest lead us to overstep the bounds of the law and the Constitution: for although we may bring one criminal to punishment, we may furnish the means by which an hundred innocent persons may suffer.
>
> The Constitution was made for times of commotion. In the calm of peace and prosperity there is seldom great injustice. Dangerous precedents occur in dangerous times. It then becomes the duty of the judiciary calmly to poise the scales of justice,

> unmoved by the arm of power, undisturbed by the clamor of the multitude.

As this court proceeds to examine the issues presented by the parties to this dispute, my hope is that we pay heed to the wise advice of Judge Cranch to "calmly poise the scales of justice." We all should be prepared to live with the ultimate result.

DISSENT

[Filed: September 19, 2001]

BOGGS, Circuit Judge, dissenting from Order extending the Stay of Execution to October 8, 2001.

On the afternoon of Monday, September 10, this court issued an order containing the language "but the execution will be stayed until September 18, 2001, upon the request of a panel member . . . ." Late that day, I made a request for an en banc vote, and a voting ballot was sent out by the Clerk that evening asking for votes to "determine whether to vacate the 8-day stay of execution entered in this case." It would, of course, have been absurd for such a ballot to be sent out if no stay were in effect.

A candid reader may compare the above undisputed facts with the statements in the addenda to Judge Jones's concurrence, which he filed on September 19.

The addenda also contains the statement "that a majority of the active judges (confirmed by the Clerk) had expressed a desire to join in the thirty day stay . . . ." No information has come to my attention to suggest that the Clerk so confirmed the position of a majority of the active judges.

DISSENT

[Filed: September 19, 2001]

SUHRHEINRICH, Circuit Judge, dissenting from the refusal to vacate the panel's stay and dissenting from the order extending the stay.

I write in dissent of the so-called en banc court's decision to grant a thirty-day stay of execution. I do not quarrel that any federal judge could grant a stay. *See* 28 U.S.C. § 2251. My problem is with the "procedure" used in this case.

A thirty-day stay was granted without anyone from the Court asking me, a member of the panel, for my opinion, let alone my vote. This vote was not an en banc procedure but was done in secrecy by some of the active members of the Court. The vote was taken orally by telephone and not by written response to a petition as is the custom of this Court. There was no motion or formal request for me to reply to. If any of the Judges voting had bothered to read my opinion, they would know that there is a serious question as to whether this decision can even be reviewed by an en banc court. They also would know that Byrd's attorneys had this affidavit since *1989*. Byrd was under an order by this Court in 1994 to raise and divulge any claim he might have. After oral argument and before the decision was made on the first habeas petition, Byrd had eighteen months to ask for leave to amend his petition. Byrd's attorney reported to a newspaper that he was holding back on the so-called "actual innocence" affidavit. Yet Byrd waited almost one year after our decision was filed, and, at the eleventh hour, filed this second habeas

petition.[1] It may be that Byrd's attorney should be censured, but in the end, this attorney has "had his way" with this Court.

As I understand the facts, a few select active judges were called by telephone for their vote and other active judges were not. In fact, as of this date, there is not any formal written confirmation or identification of who voted. There was no discussion as to the views and opinions of the minority of the Court members. This Court should be governed by the Rule of Law, and proper procedures are part of that concept. I write this dissent in the hope that something like this never happens again, in this Court or in any other court.

DISSENT

[Filed: September 19, 2001]

ALICE M. BATCHELDER, Circuit Judge, dissenting from the order extending the stay of execution, in which SILER, Circuit Judge, joins.

The order granting the stay of execution until October 8, 2001, states "A majority of the active judges have voted to extend the stay of execution . . ." It does not say that the request for this stay was referred to all of the active judges of

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[1] I should add that Byrd engaged in the same deceitful behavior in state court. As the state trial court judge noted on May 25, 2001, Byrd withheld the 1989 affidavit "even though Byrd had a motion for a new trial pending at that time." *State v. Byrd*, No. B-831662(A) (Hamilton C.P. May 25, 2001).

the court. In fact, no such request was referred to me at any time. Rather, the request--which apparently came not from the petitioner but from Judge Jones--was referred only to those members of the court who could be counted upon to vote in favor of the stay.

As best I am able to determine, one judge of this court orally ordered this stay to be entered, stating that it represented the votes of a majority of the court. There was never any written request for a stay. There was no written vote. In short, there is no record of the cabal that resulted in this stay.

There is no room for argument about whether all of the judges in active service are members of the en banc court. They are. *See* 28 U.S.C. § 46(c). In this circuit, however, only some of those judges are permitted to have notice of requests made to the en banc court and to vote on those requests.

I write in dissent from this purported order because I was given no opportunity to vote on the request for the stay, and I will not be party to either the procedure that produced it or the precedent that some of the members of this court are attempting to set.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 01-3927

In re: JOHN W. BYRD, JR.,
Movant.

Filed: September 11, 2001

Before: JONES, SUHRHEINRICH and
BATCHELDER, Circuit Judges.

AMENDED ORDER DENYING JOHN BYRD'S MOTION TO DETERMINE WHETHER 28 U.S.C. § 2244(b) OF THE AEDPA APPLIES TO HIS CASE.

SUHRHEINRICH, Circuit Judge. Movant John W. Byrd, scheduled to be executed by the State of Ohio on September 12, 2001 at 10 a.m., seeks a stay of execution while he pursues a second federal habeas petition.[1] Byrd also

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[1] Byrd does not characterize his motion as such. Rather, the motion is styled as "John Byrd's Motion [to] Determine Whether 28 U.S.C. § 2244(b) of the AEDPA Applies to His Case." As relief, he requests that "this Court [] determine that § 2244 of the AEDPA does not apply to him." In the alternative he "asks the Court to grant a stay and remand his

asks this Court to determine that 28 U.S.C. § 2244(b), the Anti-Terrorism and Effective Death Penalty Act, "AEDPA," which bars second or successive petitions unless they are based on facts which could not have been discovered previously through the exercise of due diligence, does not apply to him. For the following reasons, Byrd's motion for stay of execution is **DENIED**. Byrd's request to file a second habeas petition is also **DENIED** as barred under § 2244(b) of the AEDPA.

I.

Byrd was convicted by a jury and sentenced in 1983. He was originally scheduled to be executed on January 27, 1984. Byrd's convictions and sentences were upheld on direct appeal to the Ohio Court of Appeals, *see State v. Byrd*, No. C-830676, B-831662 (Ohio Ct. App. Feb. 5 1986), on direct appeal to the Ohio Supreme Court, *see State v. Byrd*, 512 N.E.2d 611 (Ohio 1987), and the Supreme Court denied certiorari. *See Byrd v. Ohio*, 484 U.S. 1037 (1988). Byrd also filed a motion for a new trial in December 1983, which the trial court denied in September 1989. The Ohio Court of Appeals upheld the trial court, *see State v. Byrd*, No. C-890659 (Ohio Ct. App. Feb. 13, 1991), and the Ohio Supreme Court subsequently declined jurisdiction. *See State v. Byrd*, 574 N.E.2d 1092 (Ohio 1991).

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case to the district court for an evidentiary hearing into whether his evidence meets *Schlup's* actual innocence gateway standard for filing a second petition." He also states that "[i]f the Court determines that § 2244(b) does not apply to Byrd's case, he will immediately file in the district court the second habeas petition he tendered to this motion." However cast, Byrd is seeking the permission required by 28 U.S.C. § 2244(b)(3)(A) to file as second habeas petition.

In 1988 Byrd filed his first petition for state postconviction relief, which the trial court denied. The Ohio Court of Appeals reversed in 1991 and remanded the case for further proceedings. On remand the trial court again entered summary judgment for the state, and Byrd appealed. The Ohio Court of Appeals affirmed, *see State v. Byrd*, No C-910340 (Ohio Ct. App. Feb. 26, 1992), and the Ohio Supreme Court declined jurisdiction. *See State v. Byrd*, 596 N.E.2d 472 (Ohio 1992).

Byrd filed his initial petition for writ of habeas corpus under 28 U.S.C. § 2254(d) on March 7, 1994. The district court denied an evidentiary hearing and habeas relief in 1995. *Byrd v. Collins*, No. C-1-94-167, slip. op. (S.D. Ohio July 28, 1995); *Byrd v. Collins*, No. C-1-94-167, slip. op. Nov. 2, 1995). Last year, over dissent, this Court affirmed the judgment of the district court. *Byrd v. Collins*, 209 F.3d 486 (6th Cir. 2000).[2] A divided court denied Byrd's petition for rehearing *en banc*. *Byrd v. Collins*, No. 96-3202, *amended en banc order* (6th Cir. Aug. 22, 2000). The United States Supreme Court denied Byrd's petition for writ of certiorari on January 8, 2001. *Byrd v. Collins*, 531 U.S. 1082 (2001). The district court subsequently issued a mandate dismissing Byrd's habeas petition on January 25, 2001.

On January 26, 2001, Byrd filed a motion in the Ohio Supreme Court seeking a stay of execution to permit him to litigate the issue of his actual innocence of the death penalty. On March 20, 2001, the Ohio Supreme Court issued an entry permitting Byrd to file a second state post-conviction petition in the trial court and remanding the case for a hearing on the claim that he was actually innocent of the death penalty. The

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[2] For a thorough review of the underlying events, *see Byrd v. Collins*, 209 F.3d 486 (6th Cir. 2000), *cert. denied*, 531 U.S. 1082 (2001).

Ohio Supreme Court's entry set Byrd's execution date for September 12, 2001. *State v. Byrd*, 744 N.E.2d 190 (2001).

Byrd filed a petition for post-conviction relief in the Hamilton County, Ohio, trial court on April 9, 2001. In it he raised, *inter alia*, the claim that he was actually innocent of the death penalty. Byrd based his first claim on the 1989 affidavit of co-defendant John Brewer, in which Brewer alleges that he, not Byrd, actually murdered Monte Tewksbury. In his second claim Byrd alleged that the trial testimony of state's witness Ronald Armstead and the grand jury testimony of state witness Virgil Jordan were not credible. He also requested discovery of records from the prosecutor's office and the state department of corrections. The trial court denied Byrd's discovery requests and dismissed Byrd's post-conviction petition without an evidentiary hearing on May 25, 2001. *State Byrd*, No. B-831662(A) (Hamilton C.P. May 25, 2001). Regarding the Brewer affidavit, the court held:

> Byrd and his attorneys agree that they received Brewer's 1989 affidavit in 1989. For tactical reasons, they did not file the affidavit or make it known to this or any court at that time even though Byrd had a motion for a new trial pending at that time. Byrd, in 1989, was pursuing an appeal and a motion for new trial contending in part that Byrd was not even at the scene of the crime on the night in question. Brewer's affidavit puts Byrd squarely at the crime scene.
>
> As a consequence of this tactical decision by Byrd and his attorneys, Byrd is now barred, under Criminal Rule 33, from filing a motion for a new trial because, as his attorney conceded in oral argument, the 1989 affidavit is not newly discovered evidence.

> Byrd and his attorneys now insist that the 1989 affidavit is true. Thus, Byrd concedes that the position he pursued in court for so long, that he was not at the crime scene, is untrue. Byrd now concedes that he was there but that Brewer, not Byrd, stabbed the victim.
>
> The affidavit of Brewer in 1989 lacks any credibility whatsoever. The 1989 affidavit is inconsistent with his 2001 affidavit to say nothing of his sworn testimony at his trial. As the State accurately points out, Brewer continued to make statements identifying Byrd as the principal offender well into his period of incarceration to a variety of people. The Brewer affidavit lacks any credibility for a variety of reasons including those cited by the State during oral argument. The affidavits fail to meet the standard set forth in *Herrera v. Collins*, 506 U.S. 390 (1993).

The trial court ruled that the claim of actual innocence based on Armstead's lack of credibility was barred by res judicata.

The Ohio Court of Appeals affirmed the trial court's judgment on August 21, 2001. *State v. Byrd*, No. C-010379, 2001 WL 950185 (Hamilton Ct. App. Aug, 21, 2001) (per curiam). The appeals court stated in relevant part:

> In his first claim for relief, Byrd contended that he was "actually innocent" of aggravated murder because his co-defendant John Brewer killed Tewksbury. Byrd cited to portions of the trial transcript and material adduced at his trial to demonstrate that Brewer was the killer. Byrd additionally presented two affidavits signed by Brewer on May 16, 1989, and January 24, 2001, respectively, in which Brewer claimed that he, and not Byrd, fatally stabbed Tewksbury. Byrd also

> presented the affidavit of Dan Cahill, a fellow inmate of Brewer at the Southern Ohio Correctional Facility, who claimed that Brewer had told him that he murdered Tewksbury.
>
> . . .
>
> In this case, the trial court dismissed Byrd's claim of "actual innocence" for two reasons: first, because it did not give rise to a constitutional violation in the proceedings that resulted in his conviction; and second, because the evidentiary basis for the claim-John Brewer's statement that he had actually killed Tewksbury--"lacked any credibility whatsoever." We agree. . . . With respect to the second reason, we note, under *Herrera*, *supra*, that the evidentiary threshold for a claim of actual innocence is "extraordinarily high." On the state of the record in this case, the trial court was entitled to conclude that the evidence provided by Byrd in the affidavits fell "far short" of that which would have been necessary to make out a cognizable constitutional claim.

- N.E.2d at - , 2001 WL 950185, at * 5-7 (footnote omitted). The Ohio Court of Appeals also agreed with the trial court's conclusion that Byrd's second claim challenging Armstead's credibility was barred by res judicata because it had been raised at his trial, on appeal, in his first postconviction petition, and in federal habeas corpus proceedings.

On August 29, 2001, the Ohio Supreme Court declined jurisdiction and dismissed the appeal "as not involving any substantial constitutional question." *State v. Byrd*, Case No. 01-1515 (August 29, 2001).

II.

Under the AEDPA, a petitioner is required, prior to filing a second or successive habeas corpus petition in the district court, to seek authorization "in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U.S.C. § 2244(b)(3)(A).[3] Under the AEDPA, a second or successive habeas corpus application under § 2254 that was not presented in a prior application "shall be dismissed unless" the applicant shows "the factual predicate" for his new claim of innocence "could not have been discovered previously through the exercise of due diligence," or that the claim "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2244(2)(A) & (B).[4]

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[3] Under 28 U.S.C. § 2244(b)(3)(C), "[t]he court of appeals may authorize the filing of a second or successive application only if it determines that the application makes prima facie showing that the application satisfies the requirements of this subsection." Furthermore, "[t]he grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. § 2244(b)(3)(E). *See also In re King*, 190 F.3d 479 (6th Cir. 1999) (en banc) (holding that denial of permission to file a second or successive habeas petition under AEDPA is not subject to en banc review). Although Byrd's initial federal habeas petition predated the effective date of the AEDPA, this attempt at filing a second habeas petition is clearly governed by the AEDPA. *Cf. Slack v. McDaniel*, 529 U.S. 473 (2000) (holding that an appeal from the dismissal of a habeas corpus petition after the effective date of the AEDPA is governed by AEDPA, regardless of whether the habeas petition was filed in the district court

Byrd does not rely on a new rule of constitutional law and he openly admits that he cannot establish that the factual predicate for his new claim is newly discovered. *See* Byrd's Memorandum in Support at 17 ("John Byrd has not claimed and could not claim that he has *newly discovered* evidence of actual innocence of the death penalty as defined in § 2244(b) of AEDPA.") (Emphasis in original.) This is the case because Byrd deliberately chose not to use his proof of actual innocence - Brewer's statements - in support of his initial state post-conviction petition, and he likewise chose not to cite Brewer's affidavit in his first federal habeas petition. Thus, as Byrd concedes, he cannot satisfy § 2244(b)'s requirements.

Instead, he argues that under pre-AEDPA "abuse of the writ" decisions, habeas petitioners were allowed to file second or successive petitions raising claims that were or could have been raised earlier when the petitioner met the "actual innocence/fundamental miscarriage of justice" exception, as defined by the Supreme Court in *McCleskey v. Zant*, 499 U.S. 467, 494-95 (1991), and *Schlup v. Delo*, 513 U.S. 298 (1995). Byrd asserts that the pre-AEDPA "abuse of the writ" standard, rather than § 2244(b), should apply to his case because his initial habeas petition was filed prior to the effective date of the AEDPA, and the application of the AEDPA standards would have an "impermissibly retroactive

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before or after AEDPA's effective date). *See also Steward v. Martinez-Villareal*, 523 U.S. 637, 643 (1998) (noting that had the prisoner's current request for relief been a second application, it "plainly should have been dismissed" under § 2244(b) of the AEDPA, even though his initial federal habeas petition was filed in 1993, prior to the enactment of the AEDPA).

[4] Section 2244(b)(2) contains a third basis for permitting a second or successive petition, that is not relevant in this case.

effect." He cites our decisions in *In re Hanserd*, 123 F.3d 922 (6th Cir. 1997) and *In re Sonshine*, 132 F.3d 1133 (6th Cir. 1997) in support of his argument.

Our initial inquiry is whether provisions of the AEDPA apply to this case. *See In re Green*, 144 F.3d 384, 385 (6th Cir. 1998) (per curiam).[5]

> When a case implicates a federal statute enacted after the events in suit, and Congress has not expressly prescribed the statute's proper reach, the court must determine whether the new statute would have a retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280-81 . . . (1994).

Id. at 386. In *Hanserd*, we determined that Congress has not expressed any clear intent as to the statute's proper reach. *See Hanserd*, 123 F.3d at 924. We must therefore determine whether the provisions of the AEDPA apply to this case, resorting to *Landgraf's* default rules to decide whether AEDPA may be applied here. *See id.*

In *Hanserd*, the petitioner, who pleaded guilty to using a firearm in a drug trafficking offense, in violation of 18 U.S.C. § 924(c), filed his initial § 2255 in 1995, arguing that his drug conviction violated the Double Jeopardy Clause. The district court denied the motion in July 1995, and we affirmed on appeal. *See Hanserd v. United States*, 89 F.3d 833, 1996 WL 316491 (6th Cir. June 10, 1996). While that appeal was pending, the Supreme Court announced its

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[5] Byrd likewise acknowledges that this question must be decided by this Court, and not the district court. *See Hanserd*, 123 F.3d at 934; *Sonshine*, 132 F.3d at 1134.

decision in *Bailey v. United States*, 516 U.S. 137 (1995), on December 6, 1995. *Bailey* held that the lower courts, including our own, had been sustaining convictions under § 924(c) for innocent behavior. On November 6, 1996, after the effective date of the AEDPA, Hanserd filed a motion with this court seeking leave to file a second or successive petition in the district court based upon the intervening *Bailey* decision. Specifically, Hanserd claimed that under *Bailey* he was serving time for conduct that was never a crime. *Hanserd*, 144 F.3d at 924.

Thus, the issue presented in *Hanserd* was "whether AEDPA's new restriction on filing multiple § 2255 motions 'is the type of provision that should govern cases arising before its enactment.'" *Id.* (quoting *Landgraf*, 511 U.S. at 280). Noting that Congress had not expressed any clear answer to the question, the *Hanserd* court looked to *Landgraf's* default rules to decide the issue. *Id.* This involved first determining whether the new legislation makes any changes to the controlling law, and second, whether, in light of any change, applying the relevant new law would attach new legal consequences to conduct predating the Act's passage such that applying it would have an impermissible retroactive effect. *Id.* at 924-25 (citing *Landgraf*).

The *Hanserd* court noted that under pre-AEDPA jurisprudence, a federal prisoner who wished to file a second or subsequent § 2255 motion was required to prove in the district court either that the motion did not constitute "abuse of the writ" or that he had made a "colorable showing of factual innocence," as required by *McCleskey*. *Id.* at 928. The court determined that Hanserd satisfied both of these criteria, because he could show both "cause" and "prejudice" for failing to raise the *Bailey* issue in the first motion. The court found that Hanserd had demonstrated cause for his failure to raise the issue in his first motion because at the

time, this Court had supported a broad definition of "use" under the statute and had specifically rejected the claim in his direct appeal. *Id.* at 929. Hanserd also made a sufficient showing of both prejudice and actual innocence, because "it appear[ed] from the record that he pleaded guilty and was convicted for conduct that is, under *Bailey*, not criminal." *Id.* The *Hanserd* court therefore concluded that "under the old abuse-of the-writ standard Hanserd would be entitled to raise his *Bailey* claim in a § 2255 motion." *Id.*

Next, the *Hanserd* court determined that the AEDPA standard would not allow such a § 2255 motion. The court noted that under the new law, a prisoner may file a second § 2255 motion only if the court of appeals rules that the motion contains newly discovered evidence or is based on a new rule of constitutional law. The *Hanserd* court observed that in the case *sub judice* there was no newly discovered evidence, and that *Bailey* merely decided the proper meaning of "use" under § 924(c) and did not announce a new rule of constitutional law. *Id.* at 929. Under the AEDPA standard, Hanserd's request to file the § 2255 motion would be denied. *Id.* Thus, applying the new statute would attach a severe new legal consequence to his filing a first motion; Hanserd would have lost the right to challenge his sentence. *Id.* at 931. The *Hanserd* court therefore held that Hanserd did not need permission to file a second motion to challenge his § 924(c) convictions under 28 U.S.C. § 2255 in the district court.

Relying on *Hanserd*, the movant in *Sonshine* argued that he should be allowed to file a second motion to vacate to raise ineffective assistance of trial and appellate counsel due to their failure to advise Sonshine or the district court that the court was required to impose his sentences on two counts concurrently with his undischarged prison term. Sonshine relied upon the following passage in *Hanserd*: "We therefore hold that a federal prisoner must satisfy the new requirements

of 28 U.S.C.§ 2255 only if he has filed a previous § 2255 motion on or after April 24, 1996, the date AEDPA was signed into law. As Hanserd's previous § 2255 motion was filed before that date, he does not need to meet this new standard to file a second motion." *See Sonshine*, 132 F.3d at 1134 (quoting *Hanserd*, 123 F.3d at 934). Sonshine claimed that this language in *Hanserd* meant that he did not need to meet the new gatekeeping requirements of AEDPA because, like Hanserd, his first § 2255 motion was filed before April 24, 1996. He therefore reasoned that he does not need this court's authorization to file a second § 2255 motion at this time.

The *Sonshine* court rejected this reading of *Hanserd*:

> Taken out of context in this way, the quoted portion of the *Hanserd* decision would seem at first glance to support Sonshine's position. *See also Hanserd*, 123 F.3d at 933 ("Our holding means that federal inmates will have one post-AEDPA bite at the apple, limited further, for prisoners who filed a § 2255 motion before AEDPA's enactment, by the old abuse-of-the-writ standard."). Sonshine is now requesting his "one-post AEDPA bite at the apple." However, when read in the context of the entire decision, it is clear that his case is not supported by *Hanserd*.
>
> The specific problem we addressed in *Hanserd* was whether a legitimate claim brought pursuant to *Bailey v. United States*, 516 U.S. 137, . . . (1995), could be brought before the federal courts when the movant had already presented a pre-AEDPA, pre-*Bailey* motion to vacate under § 2255, and would thus be barred from bringing another § 2255 motion by the gatekeeping requirements set up by Congress in AEDPA. While *Bailey* itself was merely a decision of

statutory interpretation--making it ineligible to support a second § 2255 motion under AEDPA--it raised concerns of constitutional dimension as numerous inmates were serving mandatory prison time for offense of which they were actually innocent. *See Triestman v. United States*, 124 F.3d 371-72, 379 (2d Cir. 1997); *Hanserd*, 123 F.3d at 929.

We, therefore, analyzed the effect that AEDPA had on a claim, such as that raised by Hanserd, which would have survived the old "abuse-of-the-writ" test, *see McCleskey v. Zant*, 499 U.S. 467, 494-95, . . . (1991), under the Supreme Court's decision in *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 . . . . We concluded that AEDPA does not apply to a movant seeking to raise a *Bailey* claim after having filed a pre-AEDPA motion to vacate because applying AEDPA would have a retroactive effect on the movant's pre-AEDPA conduct, i.e., he would be barred from filing a second motion to vacate under AEDPA whereas, before the Act, he would have been permitted to file his second motion.

Because the Hanserd court's Landgraf analysis was based upon the retroactive effect that AEDPA had on the movant's particular claim, the Hanserd holding must be similarly circumscribed. Consequently, while Hanserd is not strictly limited to claims arising under Bailey, apart from that class of claims, there will be few other cases "in which the difference matters," Hanserd, 123 F.3d at 934 n.21, and on which the gatekeeping requirements of AEDPA will thus have an impermissibly retroactive effect.

Id. at 1134-35 (emphasis added). The *Sonshine* court concluded Sonshine was not entitled to relief, because the

issue he sought to raise was basically one arising under the Sentencing Guidelines, which would be barred under both AEDPA and the abuse-of-the-writ standard. *Id.* The court further noted that Sonshine would not have prevailed under the pre-AEDPA law, because his petition would have been denied as an abuse of the writ. *Id.* Thus, the AEDPA's new restrictions did not attach new legal consequences for Sonshine, and the AEDPA had no "impermissibly retroactive effect" on the case. *Id.*

Thus, in *Sonshine*, this Court carefully limited *Hanserd*. The *Sonshine* court stated that the retroactivity determination in *Hanserd* was based on the particular facts presented, and while *Hanserd* is not strictly limited to claims arising under *Bailey*, "apart from that class of claims," few cases will qualify as those "in which the difference matters" and the AEDPA will have an impermissibly retroactive effect.

In *Green*, we refused to apply *Hanserd* where it was clear from the record that the prisoner could not have justified a second action under the pre-AEDPA cause and prejudice standard. The movant in *Green* had been convicted of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). Green filed his first motion to vacate under § 2255 on June 25, 1992, which was subsequently denied as without merit. He filed a second § 2255 motion on August 3, 1995, which the district court denied as an abuse of the writ. In his third motion, Green argued that there had been a substantive change in the law based on *Old Chief v. United States*, 519 U.S. 172 (1997). *Old Chief* held that a district court abused its discretion for admitting evidence of a prior conviction for the sole purpose of supporting a 18 U.S.C. § 922(g) conviction, after the defendant offered to stipulate to the existence of the prior conviction. *See Green*, 144 F.3d at 385. The *Green* court held that the decision in *Old Chief* announced a "new rule" of criminal procedure, and was

subject to the rule of *Teague v. Lane*, 489 U.S. 288 (1989) (holding that if a decision announces a "new rule" of criminal procedure, it is not to be applied retroactively to convictions that have already become final when the decision is announced, subject to certain exceptions). As such, it was not retroactive and was therefore inapplicable on collateral review. *Id.*

More importantly, the *Green* court held that regardless of whether *Old Chief* announced a new rule, the gatekeeping provisions of § 2244 applied to Green's case because Green would not have been able to establish cause to excuse his failure to assert this claim in his first pre-AEDPA § 2255 motion to vacate. The court reasoned: "If *Old Chief* was dictated by precedent, then his claim would not have been considered 'novel,' so as to establish cause his failure to assert this claim in his first motion to vacate." *Id.* at 387. The *Green* court concluded:

> Thus, even if *Old Chief* did not announce a new rule, applying AEDPA to this case would not have a retroactive effect on pre-AEDPA conduct. Green would have been barred from asserting this claim in a pre-AEDPA motion to vacate under the abuse of the writ doctrine, as he would not have been able to establish cause to excuse his failure to present this claim in his first motion to vacate, nor could he have otherwise made a colorable showing of factual innocence. *See McCleskey v. Zant*, 499 U.S. 467, 495 . . . (1991); *In re Hanserd*, 23 F.3d at 928-29.

Id. at 387-88. The gatekeeping provisions in § 2244 therefore applied to Green's case. *Id.* at 388.

The *Hanserd* exception, as clarified by *Sonshine* and *Green*, does not apply here. *Sonshine* makes clear that the AEDPA gatekeeping provisions of § 2244(b)(2) cannot be

avoided simply because the initial habeas petition was filed pre-AEDPA. Furthermore, it is apparent from *Hanserd*, *Sonshine*, and *Green* that the exception applies where the petitioner was *unable because of the then-current state of the law* to raise a claim in his first federal petition. In *Hanserd*, the movant's request was based on an intervening Supreme Court decision that gave the movant an argument that he could not have previously raised in his initial habeas petition. Thus, the movant in *Hanserd* had cause to excuse his abuse of the writ. He also obviously established prejudice, since the *Bailey* decision made it clear that Hanserd had been convicted for innocent behavior. The movants in *Sonshine* and *Green* could not establish cause because the new claims they sought to raise were not new or novel.

Unlike the prisoner in *Hanserd*, Byrd was on notice, certainly as early as his first federal habeas petition, that he could avail himself of the actual innocence/fundamental miscarriage of justice exception to excuse any procedural default. *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *accord Sawyer v. Whitley*, 505 U.S. 333, 339 (1992); *Dugger v. Adams*, 489 U.S. 401, 411 n.6 (1989); *Smith v. Murray*, 477 U.S. 527, 537-38 (1986); *Murray v. Carrier*, 477 U.S. 478, 495-96 (1986); *Engle v. Isaac*, 456 U.S. 107, 135 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 91 (1977); *see also McCleskey v. Zant*, 499 U.S. 467, 494 (1991). Furthermore, Byrd also had to have known that actual innocence/miscarriage of justice" exception extends to abuse of the writ. *See Herrera v. Collins*, 506 U.S. 390, 404 (1993) ("In a series of cases culminating with *Sawyer v. Whitley*, 505 U.S. 333 . . . (1992), decided last Term, we have held that a petitioner otherwise subject to defenses of abusive or successive use of the writ may have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence. This rule, or fundamental miscarriage of justice exception, is grounded in the "equitable discretion" of

habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons."); *Sawyer*, 505 U.S. 333, 339-40 (1992) ("We have previously held that even if a state prisoner cannot meet the cause and prejudice standard, a federal court may hear the merits of the successive claims if the failure to hear the claims would constitute a "miscarriage of justice." In a trio of 1986 decisions [*Kuhlmann v. Wilson*, 477 U.S. 436 (1986), *Murray v. Carrier*, 477 U.S. 478 (1986); and *Smith v. Murray*, 477 U.S. 527, 537 (1986)] we elaborated on the miscarriage of justice, or "actual innocence," exception. As we explained in *Kuhlmann*, the exception developed from the language of the federal habeas statute, which prior to 1966, allowed successive claims to be denied without a hearing if the judge were "satisfied that the ends of justice will not be served by such inquiry.")

In short, Byrd was on notice, as early as the filing of his first federal habeas petition in 1994, that his actual innocence claim, which he had admittedly known about since 1989, could have been raised and would have excused the procedural default of failing to raise it in the state courts. Instead, Byrd's actual innocence claim lay dormant through the filing and appeal of his first federal habeas petition and denial of certiorari, not to mention both the state appellate process and postconviction proceedings[6], and was not

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[6] Byrd also could have brought a successive postconviction petition in the Ohio courts. *See* Ohio Rev. Code § 2953.23(A) [pre-1995 version of the statute] (providing that "the court may, in its discretion and for good cause shown, entertain a second petition or successive petition for similar relief on behalf of the petitioner based upon the same facts *or newly discovered evidence*. (Emphasis added.) Furthermore, under the prior version of the statute, a postconviction petition could be filed "at any time." Ohio Rev. Code §

resurrected until January 2001, nearly twelve years later after Byrd admittedly became aware of it. Thus, unlike the movant in *Hanserd*, Byrd *could have* raised his actual innocence claim in his first, pre-AEDPA federal habeas petition. *And Byrd actually knew this.* In an "Application for Stay of Proceedings to Allow Investigation and Discovery of Potential Claims and For Leave to Amend Petition to Comply With McClesky v. Zant, 113 S. Ct. 1454 (1991)," filed on March 7, 1994, he stated:

> What [*McCleskey*] means to Petitioner Byrd is clear. He will have one chance to bring his habeas claims before the federal court. He and his counsel have the obligation to pursue all potential constitutional claims for which "reasonable investigation" may reveal previously unknown factual support.

2953.21. *See also State v. Byrd*, No. C-010379, - N.E.2d - , 2001 WL 950185 (Ohio Ct. App. Aug. 21, 2001) (per curiam).

As the Ohio Court of Appeals noted in its denial of Byrd's appeal of the state trial court's denial of his successive postconviction petition,

> [Byrd's] attorneys acknowledge that, since 1989, they have been in possession of an affidavit from co-defendant John Brewer stating that he, and not Byrd, fatally stabbed Tewksbury. Thus, Byrd cannot show that he was "unavoidably" prevented from presenting in a postconviction petition his claim of "actual innocence."

Byrd, 2001 WL 950185, at *4 .

For this reason, *Hanserd* and progeny are inapplicable. Furthermore, for the reasons we address next, pre-AEDPA law would not have entitled Byrd to raise the new habeas claims in any event. Thus, the application of pre-AEDPA law would not be "a difference that matters" entitling Byrd to pre-AEDPA standards under a *Landgraf* analysis.

III.

A.

Even if pre-AEDPA law applied to Byrd's case, Byrd's claim fails. First, and foremost, Byrd's case is the quintessential abuse of the writ -- as Byrd readily concedes, he deliberately withheld his actual innocence claim from his first federal habeas petition.

> Thus, for example, if a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, in the hope of being granted two hearings rather than one or for some other such reason, he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground. . . . Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless, piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay.

Sanders v. United States, 373 U.S. 1, 18 (1963) (construing 1948 version of §2244; holding that new-claim successive petitions were barred "only if there had been some abuse of the writ," which the Court described as above). *See also United States v. MacDonald*, 966 F.2d 854, 860 (4th Cir. 1992) (holding that defense counsel's strategic decision to withhold certain evidence did not amount to cause; stating that "[s]uch deliberate by-pass clearly cannot survive abuse

of the writ analysis on a second habeas appeal"; citing *McCleskey*); *Gunn v. Newsome*, 881 F.2d 949, 957 (11th Cir. 1989) ("If the petitioner knowingly and deliberately withheld the claim from a prior petition, then he has abused the writ."). Furthermore, as the Supreme Court's discussion in *McCleskey* of the history of the abuse of the writ doctrine makes clear, Byrd's deliberate abandonment of his actual innocence claim, although not the only example of conduct that disentitled a petitioner to relief, is the classic one. *See McCleskey*, 499 U.S. at 479-90 (discussing the origins and meaning of the abuse of the writ doctrine).

Byrd acknowledges that he had in his possession since 1989 the affidavit of co-defendant Brewer, which he could have used in support of his earlier claim that Armstead's testimony was perjured. He has sat on this evidence, like a chicken waiting for an egg to hatch, for twelve years, despite repeated contact with both the state and federal courts. There is simply no legal excuse for this conduct.

What makes Byrd's abuse of the writ even more outrageous is the fact this Court actually gave him the opportunity - indeed directive - to raise his actual innocence claim. When we granted a stay of execution following the district court's initial denial in 1994 of Byrd's first habeas petition

> [a]mong other things, our order granted Petitioner "120 days to allow for further investigation and discovery of possible habeas claims," *id.* at 1187-88 [*Collins v. Byrd*, 510 U.S. 1185 (1994) (Scalia, J., dissenting from denial of the application to vacate stay of execution)] . . . as well as "leave . . . to amend the petition within sixty (60) days of this order *to include any newly discovered claims*[.] *Id.* at 1187-88[.]

Byrd, 209 F.3d at 499 (emphasis added).[7] Byrd sat on this evidence despite the explicit opportunity and express instruction to raise "any newly discovered claims." In light of this prior order, Byrd's deliberate silence then, and brazen attempt now to assert the claim, is nothing short of fraud on this Court.

In short, Byrd utterly fails to establish cause to excuse his abuse of the writ. Thus, Byrd cannot prevail, even under the pre-AEDPA cause and prejudice test excusing an abuse of the writ.

B.

Even where the petitioner is unable to show cause and prejudice to excuse the abuse of the writ, he may yet be able to excuse the abuse and proceed with a second habeas petition.

> Federal courts retain the authority to issue the writ of habeas corpus in a further, narrow class of cases despite a petitioner's failure to show cause for a procedural default. These are extraordinary instances

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[7] Byrd filed his federal habeas petition on March 7, 1994, only eight days before his scheduled execution. Byrd filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The district court rejected Byrd's habeas petition on grounds of inexcusable delay. We granted a stay of execution, however. The State filed an application to vacate the stay of execution in the United States Supreme Court, which was denied by Justice Stevens, over Justice Scalia's dissent. Our order stayed Byrd's execution for "120 days to allow for further investigation and discovery of possible habeas claims." *See Collins v. Byrd*, 510 U.S. 1185 (1994) (Scalia, J., dissenting); *see also Byrd v. Collins*, 209 F.3d 486, 499 (6th Cir. 2000), *cert. denied*, 531 U.S. 1082 (2001).

> when a constitutional violation probably has caused the conviction of one innocent of the crime. We have described this class of cases as implicating a fundamental miscarriage of justice. *Murray v. Carrier*, *supra*, 477 U.S. at 485, 106 S. Ct., at 2643.

McCleskey, 499 U.S. at 494; *see also Schlup*, 513 U.S. at 314-15 (quoting *McCleskey*). Again, Byrd is not exempted from the AEDPA's standards because the outcome of this case does not differ under this exception either.

Initially, we note that Byrd invokes the wrong actual innocence standard. Contrary to his assertion, the *Schlup* standard does not apply. In *Schlup*, the Supreme Court held that for a procedural claim of innocence (as opposed to a substantive constitutional claim of innocence as in *Herrera v. Collins*, 506 U.S. 390 (1993), to meet the miscarriage of justice exception to excuse abuse of the writ, the habeas petitioner "must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Schlup*, 513 U.S. at 327.[8] However, the

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[8] Byrd indicates that he seeks to raise in his second or successive petition, the following claims:

> 1) A *Massiah* claim involving the state's use of informant Virgil Jordan to elicit statements from Byrd in violation of his Sixth Amendment right to counsel; 2) A claim that prosecutors presented testimony they knew was false when they had two witnesses identify a knife as the weapon used in the U-Totem robbery even after the crime lab concluded that the knife was not the one used in that robbery; 3) A claim that trial counsel were ineffective for failing to investigate and

Schlup standard applies to claims of actual innocence of the underlying conviction. *Id.* at 325. Byrd is not challenging his underlying conviction, but only his sentence. *See* Byrd's Memorandum in Support, at 1-2, 46 n.20. Thus, the appropriate standard of review here is the "clear and convincing standard found in *Sawyer*, "which was fashioned to reflect the relative importance of a claim of an erroneous sentence." *Id.*

> present testimony from available Workhouse inmates who could have revealed the scheme concocted by Ronald Armstead and Virgil Jordan to give false testimony against Byrd and his co-defendants; and 4) A substantive claim of actual innocence of the death penalty under *Herrera v. Collins*, 506 U.S. 390 (1993).

Byrd's Memorandum in Support at 46 n.20. On the surface it appears that Byrd is attempting to use his actual innocence claim as a "gateway through which a habeas petition must pass to have his otherwise barred constitutional claim considered on the merits." *Schlup*, 513 U.S. at 315. In actuality, he is trying to use his actual innocence claim procedurally as the way to raise barred constitutional claims *and an also-barred substantive actual innocence claim.*

Furthermore, Byrd's claim that he could not have raised his actual innocence claim in the state court because Ohio did not at the time recognize actual innocence of the death penalty as a cognizable claim must be rejected, because he most certainly could have used it in support of his due process challenge to the sufficiency of the evidence. *See State v. Campbell*, 1997 WL 5182, at *3, No. C-950746 (Ohio Ct. App. Jan. 8, 1997) (per curiam).

In *Sawyer*, the Supreme Court held that in order for a court to reach the merits of a petitioner's successive claim that he is "actually innocent" of the death penalty, the petitioner "must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law." *Sawyer*, 505 U.S. at 336. Byrd cannot meet this standard.

Byrd's only evidence is the first Brewer affidavit. It was made in 1989, six years after he had been convicted and sentenced for his part in the Tewksbury robbery and murder. *See State v. Brewer*, No. C-830672, 1984 WL 6695 (Ohio Ct. App. July 18, 1984) (affirming Brewer's conviction on direct appeal). Thus, Brewer's confession was made only after he was no longer subject to further punishment for his actions in that robbery and murder. By waiting to provide the statement until 1989, Brewer could arguably shield both himself and Byrd from the death penalty because of double jeopardy. Such tactical maneuvers render the affidavit highly suspect.

Furthermore, Brewer's affidavit contradicts his own trial testimony. In August 1983, Brewer testified at his own trial. He stated that he did not participate in the killing of Monte Tewksbury and was not at the King Kwik. Brewer Tr. 874, 877. Not long after his trial, while awaiting placement in a state penal institution, Brewer told a prison social worker and a psychology assistant on August 18, and August 23, 1983, that Byrd killed Tewskbury. In September 1983, he also wrote letters to the parole authority stating that he did not want to be sent to the Lucasville prison, where Byrd and Woodall were, and reiterating that he knew nothing about the killing. (J.A. 211.)

Byrd acknowledges these facts in his Memorandum in Support, but nonetheless attempts to explain the inconsistency with his affidavits as "understandable" because

"[t]wenty year old defendants who go on trial are not eager to be convicted of serious crimes with long sentences." Byrd's Memorandum in Support at 39. Byrd further attempts to minimize the absolute contradictions by proclaiming that "Brewer readily admits in his 2001 affidavit that his trial testimony was not truthful." *Id.* The question for this Court then is: "Was Brewer lying in 1983, was Brewer lying in 1989, or is he lying now?" This is certainly not the kind of "clear and convincing evidence" that would prevent any reasonable juror from finding Byrd eligible for the death penalty.

There is also the dying declaration of the third co-defendant, William Woodall. Woodall was diagnosed late last year with terminal cancer. On January 29, 2001, he was rushed to the local hospital because he was suffering from "chest pains, possible heart attack." (J.A. 187.) Two prosecutors and a state highway patrolman went to see him. In signed affidavits recounting their interview, they claim that Woodall blamed Byrd for Tewksbury murder. Howard H. Hudson III, a staff lieutenant assigned to the Office of Investigative Services with the Ohio State Highway Patrol, stated in his affidavit that:

> 4.) Mr. Woodall expressed extreme remorse over the death of Monte Tewksbury, stated that he was dying from lung cancer and had been told he has no more than a year to live, and that he had made his peace with God.
>
> 5.) Mr. Woodall said that year ago while he was confined at the Southern Ohio Correctional Facility in Lucasville, Ohio, he signed affidavits for the Ohio Public Defender which were not true. He signed these at the request of inmate Johnny Brewer to help inmate John Byrd, Jr. Recently he has been asked on numerous occasions to meet with the Ohio Public

Defender's representing John Byrd, Jr., but that he has refused to do so.

6.) Mr. Woodall said that Johnny Brewer never told him that he had killed Monte Tewksbury. Mr. Woodall was shown the statement in Johnny Brewer's affidavit numbered (11) wherein he stated "When I got back in the van I said to Danny Woodall, 'Man I stabbed a guy, take off.'" Mr. Woodall said that did not happen.

7.) Mr. Woodall stated that when John Byrd, Jr. and Johnny Brewer returned to the van after coming out of King Kwik, that John Byrd, Jr. had the knife.

8.) Mr. Woodall stated that while confined at the A Block of the Cincinnati Workhouse awaiting trial in 1983, John Byrd, Jr. told black inmates who were harassing him not to mess with him because he had already killed a man and wasn't afraid to kill again.

9.) Mr. Woodall said the owner of the van used during the murder of Monte Tewskbury, Leroy Tunstall, visited him in jail shortly after the crimes. Mr. Woodall told Leroy Tunstall that John Byrd, Jr. was the one who murdered Monte Tewksbury.

(J.A. 190-91.) Furthermore, Mark E. Piepmeier, an assistant Hamilton County Prosecutor, attested that:

2.) I visited Mr. Woodall at the London Correctional Facility on January 29, 2001, along with assistant Hamilton County Prosecutor William E. Breyer and St. Lt. Howard Hudson of the Ohio State Highway Patrol. . . .

> 3.) I was present when Mr. Woodall made the statements contained in the affidavit of Howard Hudson.
>
> 4.) I made a follow up visit to Mr. Woodall at the Ohio State University Hospital on Wednesday, January 31, 2001 along with assistant Hamilton County Prosecutor William E. Breyer.
>
> 5.) Mr. Breyer and I spoke to Mr. Woodall in a hospital room at the Ohio State University Hospital on January 31, 2001. Mr. Woodall said his medical condition had worsened and he realized he did not have long to live.
>
> 6.) Mr. Woodall confirmed that everything he had told myself, Mr. Breyer, and Howard Hudson on January 29, 2001 was true.
>
> 7.) Mr. Woodall said that Johnny Brewer had written to him several times and told him that he was going to lie on behalf of Mr. Byrd, and encouraged Mr. Woodall to do the same.

(J.A. 188-89.) Woodall died on April 8, 2001.

Woodall also implicated Byrd in August 1983, less than a month after his trial, when he told a prison social worker that he only drove the van and that Byrd said he stabbed the store clerk. In two letters written on August 29, 1983 and September 9, 1983, Woodall asked that he not be sent to Lucasville because Byrd was there and Byrd was mad at him. Woodall also indicted that Byrd was untruthfully blaming Brewer for the stabbing. (J.A. 192-95.)

Like Brewer's various statements over the years, Woodall's statements are contradictory. According to former inmate Dan Cahill, Woodall told him (while both were

working as Ohio Prison Industries clerks) that Byrd did not stab Tewksbury and that the wrong man was on death row. (J.A. 118.) In 1993, Woodall signed an affidavit for the Ohio Public Defender's office in which he stated that Brewer, not Byrd, carried the knife at all times, and that when he left the King Kwik store, the knife Brewer was still carrying was covered with blood. (J.A. 196-97.)

Ironically, Byrd states in his Memorandum that he did not submit Woodall's affidavit in the state postconviction petition "because of concerns about his reliability." Byrd's Memorandum in Support, at 37. Brewer's varying statements share the same consistently inconsistent stories, and we share Byrd's "concerns about [Brewer's] reliability." In short, the evidence before us is hopelessly contradictory -- both internally and as between the two co-defendants. This is simply not clear and convincing evidence that would allow us to conclude that no reasonable juror would have found Byrd eligible for the death penalty. Byrd's evidence does not satisfy the *Sawyer* standard.

IV.

Byrd asks us in the alternative to remand his case to the district court for an evidentiary hearing. However, the Ohio state courts have already rejected his new evidence of actual innocence, finding that it lacked any credibility. This factual finding is entitled to a presumption of correctness in later federal habeas corpus cases. *Patton v. Yount*, 467 U.S. 1025, 1038 (1984); *see also Ellis v. Collins*, 956 F.2d 76, 79 (5th Cir.) (holding that a state trial court's summary determination that affidavits lacked credibility was entitled to a presumption of correctness in federal habeas corpus proceedings), *cert. denied*, 503 U.S. 915 (1992). For the reasons articulated above, we find absolutely no basis to disturb that finding.

Byrd's request for an evidentiary hearing must also be rejected because he failed to diligently develop facts in support of his claim, and cannot show cause and prejudice. *See Williams v. Taylor*, 529 U.S. 420, 433-34 (2000) (noting that 28 U.S.C. § 2254's limitation on evidentiary hearings codifies and strengthens pre-AEDPA due diligence requirement established by *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992)). And in all events, Byrd had a previous opportunity to explore his actual innocence - in his first federal habeas petition. Byrd's request is rejected.

V.

Byrd's renewed attacks on trial witness Armstead's credibility, to the extent they are not barred under 28 U.S.C. § 2244(b)(1), do not provide proof of "actual innocence" sufficient to excuse an abuse of the writ. *Cf. Clark v. Lewis*, 1 F.3d 814, 824 (9th Cir. 1993) (allegation that prosecution witness could have been impeached by allegedly withheld evidence did not constitute a credible claim of "actual innocence" sufficient to show that the petitioner was actually innocent of the death penalty).

VI.

For all the foregoing reasons, Byrd's request for an exemption from § 2244(b) of the AEDPA is **DENIED.** Further, because Byrd has cited no new rule of constitutional law, or provided any newly discovered evidence, the AEDPA bars the filing of any second or successive petition. Thus, Byrd's motion for stay of execution is **DENIED.**

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Clerk

CONCURRENCE

ALICE M. BATCHELDER, Circuit Judge, separate concurrence. I concur entirely in Judge Suhrheinrich's opinion. I write separately to point out that there is no legal basis whatsoever for the stay of execution purportedly granted by a majority of the en banc court, apparently on an oral motion and with notice to only some of the members of this court.

Understanding the procedural posture of this matter is critical to an understanding of why there is no legal basis upon which a stay of execution and a continuation of this matter may be granted. Byrd concedes that the initial determination of whether the AEDPA applies to this case must be made by this court, and not the district court. The vehicle for obtaining that determination is a motion under 28 U.S.C. 2244(b)(3) for an order authorizing the filing of a successive petition. Had Byrd simply filed his petition in the district court, that court would have been required under our precedent to transfer the matter here for our determination of whether to authorize the filing. *See In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997). In short, all roads lead to the requirement

that Byrd specifically move for authority to file a successive petition.

Having been constrained to treat Byrd's motion as a motion under 28 U.S.C. § 2244(b)(3)(A), a majority of this panel has concluded that the motion must be denied because the AEDPA does apply to Byrd's attempt to obtain habeas relief, and that Byrd cannot satisfy the requirements imposed by the AEDPA on the filing of a successive habeas petition. *See* 28 U.S.C. § 2244 (b)(2) and (C). And that conclusion is neither appealable nor is it permitted to be the subject of a petition for rehearing or a petition for certiorari. *See* 28 U.S.C. § 2244(E).

Because the conclusions of the majority of this panel are final and not appealable, there is simply no basis for granting a stay of execution or a continuance.

DISSENT

NATHANIEL R. JONES, Circuit Judge, dissenting. I am convinced beyond doubt, that this court must carefully explore whether Byrd can satisfy the legal standard that would entitle him to file a second habeas petition. The complexity of the issues raised by the petitioner are of such scope and magnitude as to demand a careful and exhaustive analysis. I believe that the petition squarely implicates a question of fundamental fairness. Thus, a stay of execution is imperative. Byrd should not be put to death before this court is able to give full consideration to the issues raised in his case. *Steffen v. Tate*, 39 F.3d 622, 625 (6th Cir. 1994).

I dissent.

APPENDIX F

Cite as: 533 U.S. _____ (2001)

Dissent from denial of application to vacate

SUPREME COURT OF THE UNITED STATES

No. 01A286

MARGARET BAGLEY, WARDEN *v.* JOHN W. BYRD, JR.

ON APPLICATION TO VACATE STAY

[September 12, 2001]

The application to vacate the stay of execution of sentence of death entered by the United States Court of Appeals for the Sixth Circuit presented to Justice Stevens and by him referred to the Court is denied.

Chief Justice Rehnquist, with whom Justice Scalia and Justice Thomas join, dissenting.

John W. Byrd, Jr., was scheduled to be executed by the State of Ohio today, September 12, at 10 a.m. (edt). Byrd was convicted and sentenced to death in 1988 for the murder of Monte Tewksbury. Byrd's conviction and sentence was upheld on direct appeal, and we denied certiorari. *Byrd v. Ohio*, 484 U. S. 1037 (1988). In 1988, Byrd filed a petition for state postconviction relief. The Ohio courts denied the petition. In 1994, Byrd filed a petition for writ of habeas corpus in federal court. The district Court and Court of Appeals for the Sixth Circuit dismissed the petition, and we again denied certiorari. *Byrd v. Collins*, 531 U. S. 1082 (2001). Byrd filed another petition for state postconviction relief on April 9, 2001. The trial court and Ohio Court of Appeals dismissed the petition, and the Ohio Supreme Court

denied review. *State v. Byrd*, No. 01-1515, Aug. 29, 2001. Byrd then sought permission to file a second federal habeas petition. The Court of Appeals denied Byrd's request on September 10, but stayed the execution until September 18, 2001. On September 11, the Court of Appeals issued an order stating that a member of the court had requested that the en banc court determine whether to vacate the stay issued the day before. The order stated that less than a majority of the court voted in favor of vacating the stay, and "a majority of the active judges have voted to extend the stay of execution until October 8, 2001." No. 01-3927 (CA6, Sept. 11, 2001). The State has filed in this Court an application to vacate the stay granted by the Court of Appeals.

The Court of Appeals has stayed the execution of John Byrd without any explanation of a constitutional defect that would warrant the issuance of a stay by a federal court. The only opinion it has written convincingly concludes that there is no basis for a stay. The only reason the Court of Appeals has provided for granting the stay is to give "a panel member . . . additional time to consider the matter." In extending the stay until October 8, 2001, the court provided no additional justification. Byrd surmises that the Court of Appeals extended the stay to October 8 "in order to consider John Byrd's Petition for Rehearing En Banc." Response to State's Application Seeking Lifting of Stay 4. But the Court of Appeals' order does not offer this as a reason for granting the stay; the order only adds that "the clerk of the court is directed to file and submit to the court any petition offered by a party seeking en banc review of the decision of the panel." In any event, en banc consideration would not warrant granting a stay until October 8. As Judge Batchelder points out in her opinion, under the Antiterrorism and Effective Death Penalty Act of 1996, the panel's decision denying Byrd's successive habeas application is not "permitted to be the subject of a petition for rehearing." No. 01-3927 (CA6,

Sept. 10, 2001), p. 26 (citing 28 U. S. C. § 2244(b)(3)(E) (1994 ed., Supp. V). And even if Byrd could seek en banc review, the Court of Appeals would be able to rule on the petition well before October 8. Indeed, the Court of Appeals issued the stay on September 10, and by the very next day the court had considered and rejected a judge's request for en banc reconsideration of the stay order. That leaves the rationale that a panel member needed "additional time to consider the matter." Of course, however, the panel has already issued its opinion. Seeing no justification for the stay, I would grant the State's application to vacate the stay. See *Bowersox v. Williams*, 517 U. S. 345 (1996) (*per curiam*) ("[I]t is 'particularly egregious' to enter a stay absent substantial grounds for relief" (citing *Delo v. Blair*, 509 U. S. 823 (1993) (*per curiam*)).

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. C-1-01-698

In re: JOHN W. BYRD, JR.,
Movant.

Filed: October 15, 2001

ENTRY COMPLYING WITH REMAND ORDER OF THE SIXTH CIRCUIT COURT OF APPEALS, DATED OCTOBER 9, 2001, BY APPOINTING UNITED STATES MAGISTRATE JUDGE TO CONDUCT AN APPROPRIATE FACTUAL HEARING SUFFICIENT TO ALLOW THE SIXTH CIRCUIT COURT OF APPEALS, SITTING *EN BANC*, TO ENTERTAIN THE PETITIONER'S REQUEST FOR A SUCCESSIVE FILING

Pursuant to 28 U.S.C. § 636(b)(3) and the Remand Order of the United States Court of Appeals for the Sixth Circuit, dated October 9, 2001, the latter directing the undersigned to appoint a United States Magistrate Judge to conduct in prompt fashion an appropriate factual hearing/inquiry, leading to the development of a factual record sufficient to permit the *en banc* Court to consider the

Petitioner's Request for Leave to File a Second Petition for Writ of Habeas Corpus, this Court appoints United States Magistrate Judge Michael R. Merz to conduct such a factual inquiry/hearing, and to develop the necessary factual record.

/s/ Walter Herbert Rice

Walter Herbert Rice, Chief Judge
United States District Court